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THE

LAW OF ESTOPPEL.

BY

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ONE OF THE LORDS OF APPEAL.

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PREFACE.

If any apology is needed for this book, it is furnished by the fact that hitherto no separate work has been published, by an English lawyer, on the law of Estoppel. A great many of the cases on the subject are indeed collected and discussed in the very able and learned note to the *Duchess of Kingston's Case*, contained in Smith's Leading Cases. But, notwithstanding this, we have felt that by writing a book dealing exclusively with the law of Estoppel, we should be supplying a want which no doubt exists in the legal profession. This want has been already to a certain extent supplied in America, by Bigelow's work on the subject.

In arranging this work, we have followed Lord Coke's three principal divisions of the subject. We have not bound ourselves to any fixed style of composition. Some parts of the subject, notably those which deal with the Estoppel arising from Foreign Judgments and from Representation, *i.e.*, Representation which is either express,

or may be implied from conduct, might, we thought, be appropriately treated of by means of propositions, supported by illustrations carefully classified, and arranged, as far as possible, in chronological order ; and we have accordingly so dealt with them. In other parts we have contented ourselves with simply stating the law, and giving a reference to the authorities in the notes. We should have dealt somewhat more fully with some of the older cases, had space permitted us to do so.

In the Introductory Chapter we have made an attempt to clear the character of our subject from that odium in which it has been supposed to be enveloped. In the Appendix is contained a concise report of the *Duchess of Kingston's Case*, together with full citations of the numerous authorities referred to by the various counsel in the case; and this is preceded by a short account of the nature of the jurisdiction of the ecclesiastical courts previously thereto.

In citing the cases, only one reference is used, as a rule, in the body of the work. But, in the Table of Cases, fuller references, usually at least two, are given, and every case has been dated, an important detail which every lawyer will appreciate.

We fully acknowledge the assistance we have derived, in the preparation of this work, from the note in Smith's Leading Cases above referred to, which directed us, in

the first instance, to many sources of information which we might otherwise have passed over. The task of writing the book has nevertheless involved a considerable amount of original research, both amongst old and modern authorities; and, notwithstanding the fact that the cases connected with the subject are very numerous, we have, as far as possible, made reference to those which seemed to us of sufficient importance.

L. F. EVEREST.

E. STRODE.

FARRAR'S BUILDING, TEMPLE,
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THE

LAW OF ESTOPPEL.

CHAPTER I.

ESTOPPELS GENERALLY.

"Estoppe," says Lord Coke (*a*), "cometh of the French word *estoupe*, from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."

There is also a general definition of the term estoppel given in "Les termes de la Ley" (*b*), as follows: "Estoppel is, when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth."

The above definitions are satisfactory as far as they go, but they are not sufficiently comprehensive. For instance, they do not appear to include the estoppel arising from the judgment *in rem* of a court of record. It is, indeed, a matter of some difficulty to give a good general definition of the term estoppel. It may suffice

(*a*) Co. Litt. 352 a; see also Vin. Ab. Estop. A. 2, p. 421; citing Bro. Estop. pl. 136.

(*b*) Tit. Estop.; and see *Ashpitel* v. *Bryan*, 3 B. & S. 474.

for the present to say that it is a legal result or "conclusion" arising from an admission which has either been actually made, or which the law presumes to have been made, and which is binding on all persons whom it affects. Or we may adopt the definition of estoppel given by Bramwell, L. J., in a recent case (*c*), in which he says: "An estoppel may be said to exist where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth. This formula nearly approaches a correct definition of estoppel."

It may be as well here to point out the difference between estoppels and mere admissions; as, although every estoppel arises from an admission of some kind or another, that is, either from an actual admission or from one presumed by the law to have been made, it does not follow that every admission operates as an estoppel. One difference is that admissions can be made use of by persons who were not parties to the action in which such admissions were made, whereas estoppels are only binding on the parties or their privies (*d*). For instance, a deposition taken under the old system of Chancery procedure, and made use of by a party to a Chancery suit, was held to be admissible against him in a subsequent common law action, brought against him by a stranger to the suit (*e*).

The principle on which admissions are thus used has

(*c*) *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188.

(*d*) Judgments *in rem* are, however, binding also on strangers.

(*e*) See a case referred to by Blackburn, J., in *Hutchinson* v. *Glover*, L. R. 1 Q. B. D. 140.

been explained by Cockburn, C. J., as follows (*f*): "A party seeking to establish a fact by evidence, must be taken to assert the fact he seeks to prove: so that evidence, whether oral or documentary, will be admissible against the party using it, in a subsequent proceeding with a different party, not for the purpose of proving all the statements it contains, but only so far as it appears to have been used to establish a given fact or facts. The evidence is so used against the party producing it, as an admission by conduct, and as having been in effect his own statement."

The nature of admissions is also explained by Lord Tenterden, C. J., as follows (*g*): "A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition" (*h*). The principle here enunciated is similar to the one on which estoppels in pais depend, as will be seen hereafter, and perhaps the distinction between estoppels in pais and admissions is rather a fine one (*i*).

"The reasons," says Lord Coke (*k*), "why estoppels are allowed, seem to be these. No man ought to allege anything but the truth for his defence, and what he has

(*f*) *Richards* v. *Morgan*, 4 B. & S. 641.

(*g*) *Graves* v. *Key*, 3 B. & Ad. 318.

(*h*) See also per Bayley, J., in *Heane* v. *Rogers*, 9 B. & C. 577.

(*i*) See also, for a further discussion of the difference between estoppels and admissions, *Bringloe* v. *Goodson*, 5 Bing. N. C. 738; and Smith's L. C. (8th ed.) vol. ii. p. 802.

(*k*) Co. Litt. 352 a, note (1).

alleged once, is to be presumed true, and therefore, he ought not to contradict it: for, as it is said in the 4 Inst. 272, 'Allegans contraria non est audiendus.'

"Secondly, as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out but by evidence: and therefore, it is reasonable that some evidence should be allowed to be of so high and conclusive a nature, as to admit of no contradictory proof."

Again, Lord Coke writes thus, concerning the three principal divisions of the subject (*l*); "Touching estoppels, which is an excellent and curious kind of learning, it is to be observed that there be three kinds of estoppels, viz., by matter of record, by matter of writing (*m*), and by matter in paiis.

"(α) By matter of record, viz., by letters patent, fine, recoverie, pleading, taking of continuance, confession, imparlance (*n*), warrant of attorney, admittance.

"(β) By matter in writing, as by deed indented, by making of an acquittance by deed indented or deed poll, or by defeasance by deed indented or deed poll.

"(γ) By matter in paiis, as by liverie, by entry, by acceptance of rent, by partition and by acceptance of an estate: whereof Littleton maketh a special observation, that a man shall be estopped by matter in the country without any writing."

Lord Coke then proceeds to lay down the following general rules regarding estoppels. "To make the reader

(*l*) Co. Litt. 352 a, 352 b.

(*m*) *i.e.*, by deed only. See *Straton* v. *Rastall*, 2 T. R. 366; *Lampon* v. *Corke*, 5 B. & Ad. 606; *Graves* v. *Key*, 3 B. & Ad. 313.

(*n*) Vin. Ab. Estop. K. (3).

more capable of the learning of estoppels, these few rules, amongst others, are to be known.

"First, every estoppel ought to be reciprocal, that is, to bind both parties (*o*), and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel (*p*). Privies in blood, as the heir (*q*), privies in estate, as the feoffee (*r*), lessee (*s*), &c.: privies in law, as the lord by escheat and tenant by the curtesie, tenant in dower (*t*), the incumbent of a benefice,

(*o*) See also Sheppard's Touchstone (8th ed.) p. 275; Cro. Eliz. 37; *Gaunt* v. *Wainman*, 3 Bing. N. C. 69; *Pullen* v. *Purbeck*, 12 Mod. 361. This applies only to cases where both parties are intended to be bound, since otherwise there could be no estoppel by deed poll, see Bac. Ab. Tit. Leases (*o*); or in some cases of representation, see *post*, p. 386.

(*p*) The general rule is that everyone, who claims under an estoppel, shall take advantage of an estoppel, see Com. Dig. Tit. Estop. p. 195: and instances there given. See also *Heane* v. *Rogers*, 9 B. & C. 577; *Richards* v. *Johnston*, 1 H. & N. 660; *Gaunt* v. *Wainman*, 3 Bing. N. C. 69; *Doe* d. *Marchant* v. *Errington*, 6 Bing. N. C. 79; *Lady Wenman* v. *Mackenzie*, 5 E. & B. 447; *Spencer* v. *Williams*, L. R. 2 P. & D. 230.

(*q*) See Vin. Ab. Estop. p. 447, *et seq.*, and p. 478. It appears, however, that no estoppel of the father binds the heir in tail. See Jenkins's Rep. p. 113, Case XX., and Statute De Donis. Moreover a personal estoppel does not bind the heir, see Jenkins's Rep. 8th century, p. 330, Case LIX.

(*r*) See Vin. Ab. Estop. p. 447. Thus an assignee of a set of chambers in Lincoln's Inn was held not to be estopped from denying the title of his assignor, as he held from the trustees of the Inn, and there was consequently no privity of estate between him and the assignor: *Doe* d. *Marchant* v. *Errington*, 6 Bing. N. C. 79; see also *Palmer* v. *Ekins*, 2 Ld. Raymond, 1551; *Trevivian* v. *Lawrence*, 1 Salk. 276.

(*s*) But not disseisees: see Vin. Ab. Estop. p. 432.

(*t*) A widow continuing in possession of her husband's property after his death, is bound by estoppels respecting the title to the property which would have bound him: see *Doe* v. *Skirrow*, 2 N. & P. 123.

and others that come under by act in law, or in the post, shall be bound and take advantage of estoppels (*u*); and a rebutter (*v*) is a kind of estoppel."

Persons deriving their titles through others, are estopped by the same matters as estopped the parties through whom they claim (*w*). But there is no estoppel on persons who are not parties; *e. g.*, if A. and B. are named executors in a will they are not estopped afterwards from saying that they were not executors, as they are not parties to the will, but are named by the testator (*x*).

"Secondly.—That every estoppel, because it concludeth a man to allege the truth, must be certain (*y*) to every intent, and not to be taken by argument or inference."

There is a rule laid down in Viner's Abridgment to a similar effect, viz., that a man shall not be estopped by a generality, otherwise by a particularity (*z*).

"Thirdly.—Every estoppel ought to be a precise affirmation (*a*) of that which maketh the estoppel, and not to be spoken impersonally; as if it be said, 'ut dicitur,

(*u*) See also per Ld. Ellenborough in *Outram* v. *Morewood*, 3 East, 346; and see *Ward* v. *Wilkinson*, 4 B. & Ad. 412; *Simpson* v. *Pickering*, 1 C. M. & R. 529.

(*v*) For a definition and derivation of the term Rebutter, see Co. Litt. 303 b (*h*), and 365 a.

(*w*) Vin. Ab. Estop. p. 443, citing Bro. Estop. pl. 142.

(*x*) *Ibid.*

(*y*) Vin. Ab. Estop. A. 2, p. 421, citing Bro. Estop. pl. 172, and pl. 177.

(*z*) See Vin. Ab. Estop. pp. 465, *et seq.* See also *Doddington's Case*, Co. Rep. vol. i. 519; *King* v. *Percevall*, 1 Rolle's Rep. 430.

(*a*) *e.g.*, If I grant all my lands I had by my father, this is no estoppel, but if it be Blackacre, it is, see Vin. Ab. Estop. p. 462.

quia impersonalitas non concludit, nec ligat: impersonalis dicitur, quia sine personâ.' Neither doth a recital conclude, because it is no direct affirmation (*b*).

"Fourthly.—A matter alleged that is neither traversable nor material shall not estoppe (*c*)." So also mere surplusage does not act as an estoppel (*d*).

"Fifthly.—Regularly a man shall not be concluded by acceptance or the like, before the title accrued.

"Sixthly.—Estoppel against estoppel doth put the matter at large (*e*).

"Seventhly.—Matters alleged by way of supposal (*f*) in counts shall not conclude after non-suit: otherwise it is after judgment given: and after non-suit, albeit the supposal shall not conclude, yet the bar, title, replication, or other pleading of either party, which is precisely alleged, shall conclude after non-suit (*g*).

"Eighthly.—Where the veritie is apparent in the

(*b*) See, however, *Willoughby* v. *Brook*, 2 Cro. Eliz. 756; *Bowman* v. *Taylor*, 2 A. & E. 278; and other cases which will be referred to in a later chapter. These cases decide that a recital, in order to be binding as an estoppel, must be the recital of a particular fact.

(*c*) See Vin. Ab. Estop. pp. 432, 435, citing Bro. Estop. pl. 103, and pl. 458; also Estop. M. (3), M. (4), citing Bro. Estop. pl. 13, and pl. 165. See also *Morgan* v. *Vaughan*, Sir T. Raymond, 456.

(*d*) See Vin. Ab. Estop. p. 458; Bro. Estop. pl. 27; *Attorney-General* v. *King*, 5 Price, 195.

(*e*) "If one party pleads an estoppel, and the other pleads another estoppel against him again, this is estoppel against estoppel which puts the matter at large," Bro. Estop. pl. 183. For an instance of an estoppel against an estoppel, setting the matter at large, see *Baker* v. *Willis*, Cro. Car. 1. 476; see also 1 Ro. Ab. Tit. Estop. 874.

(*f*) See Vin. Ab. Estop. p. 441; and for an explanation of the term Supposal, see Com. Dig. Tit. Pleader, G. 13, and Vin. Ab. Supposal, H. 2.

(*g*) See Vin. Ab. Estop. Subheading, Supposal, p. 111, citing Bro. Estop. pl. 191, and pl. 39.

same record, there the adverse party shall not be estopped to take advantage of the truth: for he cannot be stopped to allege the truth when the truth appeareth of record (*h*).

"Ninthly.—Where the record of the estoppel runs to the disability or legitimation of the person, there all strangers shall take benefit of that record: as outlawrie (*i*), excommengement, profession, attainder of præmunire, of felony, bastardy (*j*), mulierty: and shall conclude the parties though they are strangers to the record (*k*). But of a record concerning the name of the person, quality, or addition, no stranger shall take advantage, because he shall not be bound by it (*l*)."

There is one exception to the rule that estoppels ought to be reciprocal, that is, should bind both parties, and that is in the case of the crown; for it appears from the authorities that the king is not bound by estoppels, though he can take advantage of them. Thus, it is laid down in Viner's Abridgment (*m*) that the king is not bound by estoppels (*n*), and that the king is not estopped by his

(*h*) For examples of this, see Co. Litt. 352 b. (*n*) and (*o*); and Com. Dig. Tit. Estop. pp. 196, 197.

(*i*) Vin. Ab. Estop. p. 450, citing Bro. Estop. pl. 15.

(*j*) Vin. Ab. Estop. p. 443, citing Bro. Estop. pl. 15.

(*k*) So if a man confesses the deed of his ancestor pleaded against him, it is estoppel for all the world to plead it, Bro. Estop. pl. 15.

(*l*) For an exception in the case of mulierty, see Co. Litt. 352 b. (*p*).

(*m*) Vin. Ab. Estop. p. 432, citing 2 Ro. Rep. 304.

(*n*) See also *Sheffield* v. *Ratcliffe*, Hobart, at p. 339, citing *Alton Woods's Case*, reported in 2 Anderson, 154; Jenkins's Rep. 6th century, 251, case 42, and Co. Rep. vol. i. p. 68. See also *R.* v. *Dehue*, 10 Mod. 200, cited in Petersdorff's Ab. Tit. Estoppel.

patent (*o*). It is also stated in Brooke's Abridgment (*p*) that the king shall not be concluded, if he has matter to serve him. "The king," says Holt, C. J., in *Sir Edward Coke's Case* (*q*), "is not bound by estoppels nor recoveries had betwixt strangers, nor by fundamental jurisdiction of courts, as appeareth 38 Assize 20, where a suit was for tithes in the Exchequer, being a mere spiritual thing: and shall he be bound by a conveyance?" On the other hand "the king shall take advantage of an estoppel, though he be not party to the record; for he is always present in the court" (*r*).

The question sometimes occurs whether the law is opposed to estoppels or in favour of them, and the expression "estoppels are odious," has occasionally been cited as applicable to estoppels generally, as pointed out by Lord Blackburn in the case of *Burkinshaw* v. *Nicolls* (*s*). Thus in the case of *Baxendale* v. *Bennett* (*t*), Bramwell, L. J., says, "Estoppels are odious; and the doctrine should never be applied without a necessity for it." But, on referring to the older authorities in which the expression occurs, it will be found that it is not applicable to every class of estoppel. The expression occurs in Co. Litt. 365 b, at the end of a discussion on the difference between warranties and estoppels. "A warranty," says Coke (*u*), "is a covenant real annexed to lands or tenements, whereby a man and his heirs are

(*o*) Vin. Ab. Estop. p. 461, citing D'Anver's Ab. vol. iii. p. 267, and *Sir Michael Stanhope's Case* (*dubitatur*).

(*p*) Bro. Estop. pl. 206.

(*q*) Godbolt, 295. But query as to this, and see Vin. Ab. Estop. p. 478.

(*r*) 2 Inst. p. 39.

(*s*) L. R. 3 App. Cas. at p. 1026.

(*t*) L. R. 3 Q. B. D. at p. 529.

(*u*) Co. Litt. 365 a.

bound to warrant the same; and either upon voucher or by judgment in a writ of warrantiæ cartæ, to yield other lands and tenements to the value of those that shall be evicted by a former title, or else it may be used by way of rebutter," that is, it may be presumed, as an estoppel against the heir, in case he brings an action of ejectment in contravention of his ancestor's warranty.

And again, he says (*x*), "Note, there is a diversity between a warranty on the part of the mother, and an estoppel; for an estoppel on the part of the mother, shall not bind the heir, when he claimeth from the father. Note, that warranties are favoured in the law, being part of a man's assurance; but estoppels are odious."

So that evidently what Lord Coke intends to say is that, whereas on the one hand it is fair and right that a man's express covenant or warranty should bind him and those claiming under him, it is unfair that a man's tortious acts should bind his successors and prevent them claiming their just rights (*y*).

And, although Lord Coke writes of estoppels in one passage, that they are odious, in another place he says that they are an excellent and curious kind of learning (*z*).

The above expression, "estoppels are odious," occurs again in the argument of counsel for the defendant, in a

(*x*) Co. Litt. 365 b.

(*y*) See also *Syms's Case*, Co. Rep. vol. iv. p. 245, where a difference is pointed out between the effect of a collateral warranty and an estoppel. And see further, for a discussion as to warranties, Doctor and Student, pp. 262 *et seq.*

(*z*) Co. Litt. 352 a.

case of *Skipwith* v. *Green* (*a*), and it was adopted by Pratt, C. J., in his judgment in the same case, where he says, "It has been truly said at the bar, that estoppels are odious in the law: and it would be very hard that the defendant should be bound by this description: and, though all the parties to an indenture are bound by the words thereof in point of law, because they agree to it: yet that must be intended of material words, and not to every minute and descriptive words and circumstances." The estoppel however, in the above case, arose out of the description of the parcels in an indenture, and was of a very technical nature (*b*).

The above are the older authorities in favour of the odiousness of estoppels. Estoppels have also been condemned in modern times, and by eminent judges. Thus, in the case of *The General Finance Co.* v. *Liberator Building Society* (*c*), where an estoppel by deed was again in question, Sir G. Jessel, M. R., said "I think that I ought not to attempt in any way to extend this doctrine (*i. e.*, of estoppel), by which falsehood is made to have the effect of truth. In my opinion it should not be carried further than a judge is obliged to carry it." And in a still more recent case, viz.: *Keate* v. *Phillips* (*d*), where it was attempted to apply the highly technical doctrine of an estoppel being fed by the subsequent acquisition of a legal estate, Bacon, V.-C., speaks very

(*a*) 1 Str. 610; see also Vin. Ab. Estop. p. 423.

(*b*) And see, as to the dictum of Brett, L. J., on estoppels by deed, *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188, at p. 206.

(*c*) L. R. 10 Ch. D. 15.

(*d*) L. R. 18 Ch. D. 560.

harshly of estoppels. He says (at pp. 668, 669) "The common law doctrine of estoppel was, as I have said, a device which the common law courts resorted to at a very early period to strengthen and lengthen their arm; and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the Court of Chancery, without any foreign assistance, did at all times put into force, in order to do justice. But the doctrine of estoppel is purely legal" (*e*). And Brett, L. J., in a recent case (*f*), speaks as follows of an estoppel by deed: "I incline to think that when the word 'estoppel' is used with reference to deeds of conveyance or of a similar nature, it is merely a phrase indicating that they must be truly interpreted."

The doctrine of estoppel may have been in its origin, as Vice-Chancellor Bacon says, purely legal, but it does not appear to have been altogether ignored in the Court of Chancery in early times. Thus, it appears, from the case of *Weale* v. *Lower* (*g*), that an estoppel which binds the estate was not unfavoured in equity. And though it is stated in *Pierce* v. *Johns* (*h*), that a judgment at law is no estoppel in equity, yet in a case of

(*e*) But Chancery proceedings do not appear to have been recognised at common law so far as to create an estoppel. Thus a writ of the Chancery reciting a man to be an infant, was not an estoppel to anyone to allege the truth: Vin. Ab. Estop. p. 453.

(*f*) *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188, atp. 206.

(*g*) Pollexf. 67.

(*h*) Bunbury's Rep. p. 11; *Holland* v. *Clark*, 1 Y. & C. C. C. 151.

Vick v. *Edwards* (*i*), where there had been a reference to the master respecting title, the Lord Chancellor was of opinion that trustees, by joining in a fine, would pass a good title to the purchaser by estoppel. The principle of estoppel was also applied in Chancery in the cases of *Bond* v. *Hopkins* (*k*), and of *Daire* v. *Beversham* (*l*).

The following passage from an old authority gives, it is submitted, a correct statement of the origin of estoppels, and of the reason for their existence. "Estoppel was devised and allowed in law for the maintenance of verity, and to restrain a man from saying a thing if it is false, and it shall conclude him from saying against that which he before affirmed" (*m*).

The following remarks of FitzGibbon (Attorney-General) arguendo, in another old authority (*n*), on the origin and doctrine of estoppels, are also in point. "The objection is that this is an estoppel, and should have been pleaded, and then gentlemen tell your lordships that estoppels are odious, inasmuch as the legal definition an estoppel is, that it stops a man's mouth from speaking the truth. My lords, however this may be found, if you divest the maxim of the quaintness and pedantry of the day, and translate it into plain English, it will be found

(*i*) 3 P. Wms. 371.

(*k*) 1 Sch. & Lefr. 413; cited in Com. Dig. vol. viii., Appendix, p. 558.

(*l*) Nelson's Chanc. Rep. 76, and Cary's Rep. p. 27; cited also in Vin. Estop. pp. 487, 462, as a case of estoppel in Chancery. And see, as to the light in which estoppels should be regarded in Equity, Doctor and Student, chap. xix. p. 56.

(*m*) *Edwards* v. *Rogers*, Sir W. Jones's Rep. 459; see also Co. Litt. 352 a, note (1); see *contra*, per Lord Kenyon, C. J., in *R.* v. *Lubbenham*, 4 T. R. 251.

(*n*) *Hume* v. *Burton*, 1 Ridgeway's P. R., at p. 247.

to contain much good sense: for in plain English it is nothing more than this. The law cannot be known until facts are ascertained: and facts can never be ascertained, unless you allow some evidence to be of such a nature as not to be contradicted: and therefore it is that estoppels are allowed."

The apparent odiousness therefore of some classes of estoppel, chiefly estoppels by deed, seems to result not so much from the nature of an estoppel, as from the highly technical rules of real property law upon which it operated, and with which it was associated.

Estoppels by record, indeed, stand upon a considerably higher footing than estoppels by deed, and are of great importance, especially in their bearing on the effect of the judgments of foreign and colonial courts. It is impossible therefore, at any rate, to consider such estoppels as "odious," or to apply to them the same strictures as have been imposed upon the doctrine of an estoppel by deed.

Estoppels in pais, or equitable estoppels as they have sometimes been called (*o*), are also of an importance which is growing daily, and far from being odious, are certainly equitable in their nature, and ought to be regarded with favour in courts of equity. Thus, in the case of *The Citizen's Bank of Louisiana* v. *First National Bank of Orleans* (*p*), Lord Selborne says, "I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract,

(*o*) See Bigelow on Estoppel, 2nd ed., chap. xviii.

(*p*) L. R. 6 H. L. 352, at p. 360; and see per Wilde, B., in *Swan* v. *North British Australasian Co.*, 7 H. & N. 603.

or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which, being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a court of equity extend, be treated as if the representations were true, and shall be compelled to make them good."

To the same effect are the remarks of Lord Blackburn in his judgment in the recent case of *Burkinshaw* v. *Nicolls* (*q*), where the learned Judge says, "Now sometimes there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense, and the doctrine of estoppel in pais has been thought to deserve the odium of the more technical classes of homologation. But the moment the doctrine is looked at in its true light it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered. When a person makes to another the representation 'I take upon myself to say such and such things do exist, and you may act upon the basis

(*q*) L. R. 3 App. Cas. 1004, at p. 1026.

that they do exist,' and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action ; and that is what I apprehend is meant by estoppel in pais or homologation. But whether the term be used in its more or less technical sense, I take it that one common idea runs through the whole, namely, that your rights, as between yourselves, must be regulated upon the basis, that that is accurate which you induced the other side to take as the basis upon which he was to act."

And apart from the authorities that have been cited to controvert the "odium thrown upon the doctrine of estoppel," there is the additional reason that this branch of law has grown up from the sound basis of judicial decision ; and, with one or two exceptions, is almost untouched by legislation. The importance of the doctrine is shown by the wide and increasing area over which it extends, and its necessity is recognised even by judges who have been most cautious in applying its principles. As Lord Bramwell says in the case of *Simm* v. *The Anglo-American Telegraph Company* (*r*), when speaking of estoppels, "I do not know how the business of life could go on, unless the law recognised their existence."

(*r*) L. R. 5 Q. B. D. 188, at p. 202. In Pitt-Taylor on Evidence (7th ed.), vol. i. p. 106, note (8), it is stated that estoppels are abolished in America. A provision to that effect was inserted in the New York Code of Civil Procedure (1850), § 1792, but it never passed into law.

CHAPTER II.

RECORDS.

"Res judicata pro veritate accipitur."—Ulpian.

In this chapter we shall endeavour to explain by illustrations taken from the older authorities and text books, what is the nature of a record, and what is a sufficient record for the creation of an estoppel, but although the illustrations given relate only to the proceedings of "courts of record," strictly so called, viz., those courts which have power to fine and imprison (*a*), yet certain other judicial proceedings, although not emanating from courts, strictly speaking of record, have come to be regarded as of equal efficacy with them for the purpose of raising an estoppel.

These proceedings are classed by the learned editors of Smith's Leading Cases (*b*), under the general heading of Proceedings of Quasi Record, and they include, amongst other things, Decrees in the old Court of Chancery, Judgments of the Ecclesiastical Courts, sentences in matrimonial suits, sentences of college

(*a*) See *Grenvelt* v. *Burwell*, 1 Ld. Raymd. 454; 12 Mod. 386; & Carth. 491.

(*b*) See the note on the Duchess of Kingston's case, 2 Smith's L. C. (8th ed.), p. 826.

visitors, &c., &c. At what period they first came to be so regarded it is difficult to determine. The old Court of Chancery, however, seems never to have been, on its equity side, a court of record (*c*), and yet its decrees have from comparatively early times, stood on the same level with the judgments of the common law courts (*d*).

Again, foreign judgments are not, strictly speaking, records, nor are foreign courts regarded in England as on the same footing as English courts of record (*e*), and yet foreign judgments are treated in England as judgments of courts of record, in so far, that they are not examinable upon the merits (*f*), except under special circumstances, which will be explained in a later chapter.

"The rolls," writes Lord Coke (*g*), "being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity, as they admit of no averment, plea, or proof to the contrary.

(*c*) See Co. Litt. p. 260. But see now the Judicature Act of 1873, ss. 16, 18.

(*d*) Buller's N. P. p. 243; *Manchester Mills*, 1 Dougl. 222; *Trotter* v. *Blake*, 2 Mod. 231; *Allason* v. *Stark*, 9 A. & E. 255; *Earl of Hopetoun* v. *Ramsay*, 5 Bell's App. Cases, 69; see, however, *Carpenter* v. *Thornton*, 3 B. & Ald. 52; deciding that an action at law was not maintainable upon a decree of a court of equity for a specific sum of money, founded on equitable considerations only, and made in *invitum*. But the dismissal of a bill was a bar to an action at law; *Tredegar* v. *Windus*, L. R. 19 Eq. 607.

(*e*) *Walker* v. *Witter*, 1 Dougl. 5; *Galbraith* v. *Neville*, 1 Dougl. 6 a (note); *Chapman* v. *Sherrie*, 5 Ir. R. C. L. 36.

(*f*) Per Tindal, C. J., in *Smith* v. *Nicolls*, 5 Bing. N. C. 208; *The Bank of Australasia* v. *Harding*, 9 C. B. 661; *The Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Kelsall* v. *Marshall*, 1 C. B. N. S. 241; *Castrique* v. *Behrens*, 30 L. J. Q. B. 163. On this point, great difference of opinion has existed.

(*g*) 1 Inst. 260.

And, if such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself: and the reason hereof is apparent, for otherwise (as our old authors say, and that truly) there should never be any end of controversies, which should be inconvenient" (*h*).

Again Willes, J., in *Irwin* v. *Sir G. Grey* (*i*), says, "the record of a superior court is the conclusive statement of a proceeding conducted with all the formalities required for a judgment, and it states either expressly or by necessary implication that the proceeding was one in which the court exercised its jurisdiction in a judicial way, and therefore that the jury was one not merely in name, but in law and in fact; and that the court sat at a time when, and was otherwise constituted so that it could properly exercise its jurisdiction." Moreover, it is pointed out in the older writers that an estoppel by record is stronger than any other kind of estoppel (*k*).

Records admit of no alteration (*l*).—"During the

(*h*) See also Vin. Ab. Estop. p. 420; and *Sharp* v. *Paslow*, cited at the end of *Vernon's Case*, Co. Rep. vol. ii., 260. See also *Gosling* v. *Warburton*, 1 Cro. Eliz. p. 128; see also per Ld. Ellenborough in *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565; and *Huffer* v. *Allen*, L. R. 2 Ex. 15.

(*i*) L. R. 1 C. P. 17; L. R. 2 H. L. 20.

(*k*) *Green* v. *Moody*, Godbolt's Rep. 384; *James* v. *Landon*, 1 Cro. Eliz. 36: Moo. 181; and see Co. Litt. 47 b. And see the note to *James* v. *Landon*, referring to *Pleadall's Case*, Moo. 96; see also Bro. Ab. Tit. Brief, pl. 420; and see in Co. Litt. 170 b, note 3; 171 a. There is, however, an exception made in the old authorities in the case of estoppels which stand upon recompense: see *Sym's Case*, Co. Rep. vol. iv. at p. 246; and *Errington* v. *Errington*, 2 Bulstr. at p. 43.

(*l*) Per Holt, C. J., in *Turner* v. *Burnaby*, 2 Salk. 567; where

term (*m*)," writes Lord Coke (*n*), "wherein any judicial act is done, the record remains in the breast of the judges of the court, and in their remembrance: and therefore the roll is alterable during that term as the judges shall direct: but when that term is past, then the record is in roll, and admits of no alteration, averment, or proof to the contrary." And it follows from this that records cannot be contradicted by error in fact (*o*). Thus, it is laid down in Bacon's Abridgment (*p*), that nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves: wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

Thus even a false verdict or an erroneous judgment may work an estoppel, so long as it remains in force, and is not upset by writ of error or attaint (*q*). On the same

a distinction is pointed out between an act of the Court done on record, and an act of the party recorded by the Court.

(*m*) As to terms, see the Judicature Act of 1873, s. 26; and R. S. C. 1883, Order LXIV., rule 14.

(*n*) Co. Litt. 260 a; *Dickson* v. *Fisher*, 1 Sir W. Bl. 664; *R.* v. *Shaw*, Russ. & Ryan, C. C. R. 526.

(*o*) *R.* v. *Carlile*, 2 B. & Ad. 362; *Whistler* v. *Lee*, Cro. Jac. 359; *Helbut* v. *Held*, 2 Ld. Raymond, 1414; referring in note to *Plommer* v. *Webb*; *Molins* v. *Werby*, 1 Lev. 76; 1 Siderfin, 94; 1 Keble, 355; *Bowse* v. *Cannington*, Cro. Jac. 244; *Cole* v. *Green*, 1 Lev. 309; *Irwin* v. *Sir G. Grey*, 19 C. B. N. S. 585: L. R. 1 C. P. 171.

(*p*) Error (*k*), 3; and see, as a modern example, *Conradi* v. *Conradi*, L. R. 1 P. & D. 514.

(*q*) Vin. Ab. Estop. p. 435, citing Bro. Estop. pl. 81; Vin. Ab. Record, p. 173, citing Bro. Record, pl. 4; see also *Overton* v. *Hervey*, 9 C. B. p. 324; *Todd* v. *Stewart*, 9 Q. B. 759; *Huffer* v.

principle a judgment is not void, even by reason of interest in the judge, but voidable only by proper proceedings being taken to set it aside (*r*). As illustrating the principle that records are conclusive evidence of the facts therein contained, we may, besides the authorities referred to in the note (*s*), cite the case of *Ex parte Newton* (*t*), where a prisoner was tried and convicted at the Central Criminal Court. After sentence, an application was made to the Court of Common Pleas, for a writ of *habeas corpus* for his discharge, on the ground that the offence was not committed within the jurisdiction of the Central Criminal Court, as alleged in the indictment. Held, that the record was an estoppel and the writ refused.

Another illustration of the above principle is furnished by the well known rule of law, that what a party recovers from another by legal process without fraud, the loser shall never recover back by virtue of any facts which would have availed him in the former proceedings (*u*).

Allen, L. R. 2 Ex. 15. But a reversed judgment does not raise an estoppel, *Riche's Case*, 3 Leon. 52 pl. 75.

(*r*) *Dimes* v. *Grand Junction Canal Co.*, 3 H. L. Cas. 785 ; referred to in *Wildes* v. *Russell*, L. R. 1 C. P. 744. See, however, as to the judgment of a referee appointed by the agreement of the parties, *Ranger* v. *Gt. West. Rail. Co.*, 5 H. L. Cas. 172.

(*s*) *Wildes* v. *Russell*, L. R. 1 C. P. 722 ; *Grœnvelt* v. *Burwell*, Ld. Raymond, 454 : 12 Mod. 386 ; *Green* v. *New River Co.*, 4 T. R. 589 ; *R.* v. *Hebden*, Buller's N. P. 231 ; *Pritchard* v. *Hitchcock*, 6 M. & G. 151 ; Phillipps on Evidence, vol. ii., p. 2, *et seq.* ; *Reed* v. *Jackson*, 1 East, 355.

(*t*) 24 L. J. C. P. 148.

(*u*) Per Ld. Denman, C. J., in *Wilson* v. *Ray*, 10 A. & E. 82, at p. 88, referring to the principle established in *Marriott* v. *Hampton*, Smith's L. C. (8th ed.) vol. ii. p. 421.

Thus, where money was paid by a bankrupt under compulsion of law, his assignees in bankruptcy were bound by it and could not recover it back (*x*); but the law appears to have been otherwise, where the legal proceedings under compulsion of which the money had been paid, had been taken in a foreign country (*y*).

Again, on a similar principle, in an action of trespass against a magistrate, a conviction by him, if no defect appears on the face of it, is conclusive evidence of the facts contained therein (*z*).

So also, if one party brings an action against another for maliciously and without probable cause signing judgment and issuing execution against him, he is estopped from denying the correctness of the judgment and of the execution (*a*).

Again, if A. brings an action against B. in England, and it is in issue between the parties whether or not a judgment was obtained against them by some third party, not a party to the present action; and to prove that it was, one of the parties puts in evidence a foreign judg-

(*x*) *Belcher* v. *Mills*, 2 C. M. & R. 150; *Reynolds* v. *Wedd*, 4 Bing. N. C. 694; *Le Chevalier* v. *Lynch*, 1 Dougl. 170: and the references in the judgments in *Philips* v. *Hunter*, 2 H. Bl. 402, 414; *contra*, *Follett* v. *Hoppe*, 5 C. B. 226. But it was otherwise where the debtor had committed a secret act of bankruptcy, *Balme* v. *Hutton*, 9 Bing. 471.

(*y*) See judgment of majority in *Philips* v. *Hunter*, 2 H. Bl. 402; *Hunter* v. *Potts*, 4 T. R. 182; and Cooke's Bankrupt Laws, vol. i. (ed. 1823).

(*z*) *Brittain* v. *Kinnaird*, B. & B. 432; referred to in *Re Clarke*, 2 Q. B. 633; and see *post*, pp. 49, 50.

(*a*) *Huffer* v. *Allen*, L. R. 2 Ex. 15. The same principle appears to apply to an action brought in England for unlawfully and maliciously conspiring to obtain a foreign judgment *in rem*, see *Castrique* v. *Behrens*, 30 L. J. Q. B. 163.

ment, then this is conclusive evidence against the other party, and he is not at liberty to shew that the proceedings were erroneous (*b*).

The old fictitious action of ejectment serves as a good illustration of the matters on which a judgment is, and on which it is not conclusive. Generally speaking, a judgment in one action of ejectment was not conclusive in another, in consequence of the fictitious nature of the proceedings. However, it was conclusive evidence of the plaintiff's title against the tenant in possession, in an action for mesne profits, for it concluded the parties as to the right to the immediate possession; but it proved nothing beyond the time laid in the demise (*c*); nor did it prove anything as to the length of time during which the tenant had occupied, or as to the value of the land (*d*).

So also a judgment may be used to prove the fact that a party had, by process of law, been compelled to pay damages to a certain amount, but not to prove the circumstances under which they were paid (*e*).

Averments which stand with the record are allowed.— Thus, although a man may not aver anything against the purport of a record (*f*), he may against its operation (*g*).

(*b*) *Tarleton* v. *Tarleton*, 4 M. & S. 21.

(*c*) See *Harris* v. *Mulkern*, L. R. 1 Ex. D. 31, at p. 36; and per Cleasby, B., in *Pearse* v. *Cooker*, L. R. 4 Ex. 92, at p. 101.

(*d*) Phill. Ev. vol. ii. pp. 9, 10; *Aslin* v. *Parkin*, 2 Burr. 665. And as to judgments by default in ejectment in Ireland, see *Kenna* v. *Nugent*, Ir. R. 7 C. L. 464; *Le Clerc* v. *Greene*, Ir. R. 7 Eq. 371.

(*e*) Phill. Ev. vol. ii. p. 4, citing *Green* v. *New River Co.*, 4 T. R. 589; and *Pritchard* v. *Hitchcock*, 6 M. & G. 151.

(*f*) *Sir T. Howard's Case*, Owen 138; *Gibbons* v. *Maltyard & Martin*, Popham, 8.

(*g*) *Hynde's Case*, Co. Rep. vol. ii. p. 456; Vin. Ab. Estop. pp. 420,

Moreover, evidence may be offered to explain a judgment given in evidence or pleaded by way of estoppel (*h*). Thus a mistake in the record does not prejudice a party to the action, by way of estoppel in a subsequent action, if the mistake was no fault of his, even if he takes no steps to correct it (*i*).

But there is a difference between the effect of a mistake in the record itself, and a mistake of the party (*k*). Thus merely putting in bail by a wrong name was considered to be the act of the court, and not of the party, and did not estop the party from pleading in an action that his or her name was a different one from that in which the bail was put in. But if the party appeared to the bail by a wrong name, that might have worked an estoppel (*l*). And on the same principle entry and acceptance on a less quantity of land than had been actually recovered in an action of dower, was held to be a bar to proceedings of *scire facias* against the *terre* tenant for the recovery of the remainder (*m*).

Records coram non judice raise no estoppel (*n*).—

423; *Pelham's Case*, 2 Leon. 65; Ro. Ab. Tit. Estop., p. 862; *Hubert's Case*, Cro. Eliz. 531; *Howlett* v. *Tarte*, 10 C. B. N. S. 813. In some of the above cases a distinction is drawn for purposes of estoppel between a record and a deed enrolled. See further *Holland* v. *Donne*, Savile 91; *Holland* v. *Bonis*, 3 Leon. 175.

(*h*) *Flitters* v. *Allfrey*, L. R. 10 C. P. 29.

(*i*) *Boyle* v. *Scarborough*, Style's Rep. pp. 395 & 440.

(*k*) Lutwyche's Rep., 524 (Appendix).

(*l*) *Stroud* v. *Lady Gerrard*, 1 Salk. 8, pl. 19.

(*m*) Moo. 679, Tit. Dower, pl. 928.

(*n*) Bro. Ab. Estop. pl. 215; Fitzherbert, Estop. pl. 18; see also Vin. Ab. Estop. p. 462; and Com. Dig. Tit. Estop., p. 196.

Thus judgments of courts of inferior jurisdiction of a thing out of their jurisdiction are absolutely void, and advantage might be taken thereof in pleading without reversal by writ of error (*o*). And such judgments are not even admissible in evidence (*p*).

So also judgments have no operation by way of estoppel, respecting matter as to which the court had no authority to adjudicate directly and immediately between the parties (*q*). For instance, an inquisition under the compensation clauses of the Lands Clauses Consolidation Act, 1845, has only reference to the amount of compensation, and not to the right of the party to demand compensation. Therefore a verdict and judgment under these clauses does not estop the company from alleging, in an action brought against them on the judgment, that the lands were not injuriously affected by their works (*r*). And a coroner's inquisition not taken *super visum corporis* would be a record *coram non judice* (*s*).

Besides having the proper jurisdiction the court must be legally constituted in order that the judgment relied on as *res judicata* may be conclusive (*t*). And the judg-

(*o*) *Frumpton* v. *Pettis*, 3 Levinz, 23; cited in *Briscoe* v. *Stephens*, 2 Bing. 213.

(*p*) See the cases cited in *Archbishop of Dublin* v. *Lord Trimleston*, 12 Ir. Eq. 251, 268.

(*q*) See the judgment of Lord Selborne in *R.* v. *Hutchins*, L. R. 6 Q. B. D. 300.

(*r*) *Read* v. *Victoria Station Co.*, 1 H. & C. 826; *R.* v. *London & N. W. Rail. Co.*, 3 E. & B. 443; *Chapman* v. *Monmouthshire Rail. Co.*, 2 H. & N. 267; In re *Newbold & Metropolitan Rail. Co.*, 14 C. B. N. S. 105; *Barber* v. *Nottingham &c. Canal Co.*, 15 C. B. N. S. 726; *Beckett* v. *Midland Rail. Co.*, L. R. 1 C. P. 241.

(*s*) As to decisions *coram non judice*, see *R.* v. *Bowman*, 6 C. & P. 337.

(*t*) *Rogers* v. *Wood*, 2 B. & Ad. 245.

ment must be final (*u*). Thus no action can be brought on an interlocutory order of an inferior court, *e.g.*, an interlocutory order for costs (*x*).

Estoppel by verdict and pleading.—The authorities differ as to whether a verdict of itself can operate as an estoppel. Thus it is laid down by some old authorities that a record cannot operate as an estoppel, unless judgment was actually given in the proceedings relied on by way of estoppel (*y*); and that a verdict, without judgment given, not being a perfect record, works no estoppel (*z*). On the other hand, it is laid down elsewhere as follows: "A verdict whereupon an attaint lies, estops all parties and their privies. An estoppel on a verdict goes a great way. Issue in tail shall never falsify it" (*a*). And Lord Coke says that a verdict is itself an estoppel upon the same matter of fact afterwards arising between the same parties, unless it has been reversed by attaint (*b*).

But where issues on matters of title in a Chancery

(*u*) *Hume* v. *Burton*, 1 Ridgway's P. R. 565.

(*x*) *Emerson* v. *Lashley*, 2 H. Bl. 248; *Fry* v. *Malcolm*, 4 Taunt. 705. For the proper remedy is by attachment.

(*y*) Vin. Ab., Former Action B. Pleadings, p. 497, citing Bro. Estop. pl. 137.

(*z*) Bro. Estop. pl. 189; Vin. Ab. Record, p. 171, citing Bro. Repleader, pl. 61.

(*a*) *Trevivian* v. *Lawrence*, 1 Salk. 276.

(*b*) Co. Litt. 227 b; Vin. Ab. Estop. p. 424; Bro. Estop. pl. 132; Peake's Evidence (3rd ed.), p. 39; *Eastmure* v. *Laws*, 5 Bing. N. C. 450. In order, however, for the verdict to operate as an estoppel on any matter, the matter must have been actually in issue between the parties, Vin. Ab. Estop. p. 480. It need not, however, have been the only one in issue, *R.* v. *St. Pancras*, Peake's N. P. Cases, 219.

suit were directed to be tried by a jury, it was held in a subsequent action between successors in title, that the verdict on the issues in the suit between the predecessors in title, did not itself create an estoppel, but that the decree and pleadings in the suit must also be taken into consideration (*c*). A verdict upon matters in issue is, however, evidence for and against all parties and privies, upon the same matters in issue between them in subsequent proceedings (*d*); but in order that it may be evidence for or against any one claiming under a party to the verdict, the claim must have been acquired through such party, subsequently to the verdict (*e*).

A judgment obtained by a compromise of the parties to an action, cannot be considered as *res judicata* so as to bind persons not parties to the action (*f*).

And judgment given for plaintiff by consent, before declaration filed, was held to be no estoppel against defendant, at common law in a subsequent suit (*g*).

But where plaintiff gave defendant notice that he might inspect a document, and that he would be required

(*c*) *Robinson* v. *Duleep Singh*, L. R. 11 Ch. D. 798.

(*d*) Com. Dig. Tit. Evidence A. 5; Gilbert on Evidence, p. 18; *R.* v. *Warden of Fleet*, Holt's Rep., 134; *Outram* v. *Morewood*, 3 East, 346; *Mondel* v. *Steele*, 8 M. & W. 872; *Carter* v. *James*, 13 M. & W. 137; *Rigge* v. *Burbidge*, 15 M. & W. 598; *Hutt* v. *Morrell*, 3 Ex. 240; *Whittaker* v. *Jackson*, 2 H. & C. 926; *Blakemore* v. *Glamorganshire Canal Co.*, 2 C. M. & R. 133.

(*e*) *Doe* d. *Foster* v. *Derby*, 1 A. & E. 783. And a verdict *inter partes* is not as a rule evidence against strangers, except where it is evidence of custom or general reputation. Roscoe's *Nisi Prius* (11th ed.), pp. 191, 192.

(*f*) *Jenkins* v. *Robertson*. L. R. 1 H. L., Sc. 117; but, as to compromises by counsel, see *Keane* v. *O'Brien*, 5 Ir. R. C. L. 531.

(*g*) Per V.-C. Wood in *Goucher* v. *Clayton*, 11 Jur. N. S. 107.

to admit it at the trial, and the judge, on summons, made an order, by consent, for the same to be admitted; held, that defendant was estopped from raising any objection to the document at the trial (*h*).

And where plaintiff confessed a defence under Rules 22, 23, of T. T. 1853; such a confession was final as to everything that had been, or might have been, controverted in the action; and plaintiff was estopped from raising the same point in a subsequent action between the same parties (*i*). But the confession did not operate as an estoppel with respect to any matters which did not arise until after the termination of the action in which the plea was confessed, and which therefore could not have been in controversy in such action (*j*). And this still appears to be the law with respect to confessions under the Rules of the Supreme Court, 1883 (*k*).

Similarly a judgment for plaintiff by default may estop defendant with respect to matters which he might have set up as a defence to the action (*kk*). And judgment against an executor or administrator by confession or default is an admission of assets, and he is estopped from afterwards denying the fact (*l*).

If an action were discontinued, the proceedings therein

(*h*) *Doe* d. *Wright* v. *Smith*, 8 A. & E. 255.

(*i*) *Newington* v. *Levy*, L. R. 6 C. P. 180; cf. *Bennett* v. *Gamgee*, L. R. 2 Ex. D. 11.

(*j*) *Hall* v. *Levy*, L. R. 10 C. P. 154.

(*k*) Order XXIV. rule 3.

(*kk*) *Williams* v. *Richardson*, 36 L. T. 505; and as to judgments by default in ejectment in Ireland, see *ante*, p. 23, note (*d*).

(*l*) *Rock* v. *Leighton*, 1 Salk. 309; *Erving* v. *Peters*, 3 T. R. 685; *Leonard* v. *Simpson*, 2 Bing. N. C. 176.

did not operate as an estoppel at common law (*m*). And it is now expressly provided by the Rules of the Supreme Court, 1883, that the plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action against all or any of the defendants, or withdraw any part or parts of his alleged cause of complaint, and that such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action (*n*).

Nonsuits did not, generally speaking, at common law, raise an estoppel in a subsequent suit: for after nonsuit the record was null (*o*). But a plaintiff who had been nonsuited might nevertheless be estopped in a subsequent suit, from pleading matters which he had omitted to plead in the former action, but which he might and ought to have pleaded in such action (*p*).

By the Judicature Act, 1875, a judgment of nonsuit, unless the Court or a judge otherwise directed (and unless set aside in the manner therein provided), had the same effect as a judgment upon the merits for the

(*m*) Bro. Estop. pl. 215; *Massam* v. *Thorley's Cattle Food Co.*, L. R. 14 Ch. D. 748.

(*n*) Order XXVI. rule 1.

(*o*) Bro. Estop. pls. 37, 108, 192, 194; Vin. Ab. Estop. p. 440; *Level* v. *Hall*, Cro. Jac. 284. But, for an instance of an estoppel in case of a non-suit, see Bro. Estop. pl. 162, and Vin. Ab. Estop. p. 451. Moreover, in the action of assize, which was a real action, an acknowledgment by plaintiff operated as an estoppel after nonsuit, Vin. Ab. Estop. p. 439. And as to the effect of dismissal of proceedings in Equity, see *post*. pp. 58, 59.

(*p*) Bro. Estop. pl. 39; Fitz. Ab. Estop. pl. 96.

defendant (*q*); and therefore estopped plaintiff from bringing a fresh action against defendant for the same cause (*r*). And a similar provision is contained in the County Court Acts, with respect to nonsuits in actions in the County Courts (*rr*).

But the above provision contained in the Judicature Act, 1875, has now been annulled (*s*), and the Rules of the Supreme Court, 1883, contain no provision with respect to nonsuits in actions in the High Court. It is however provided that the Court or a judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out: and that the Court or a judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out (*t*). It is presumed therefore that, in consequence of the above provision, an order for discontinuance or that the plaintiff's claim be struck out, with leave to plaintiff to bring a fresh action, will henceforward take the place, in actions in the High Court, of a judgment of nonsuit at common law.

The record in an action wrongly brought is no bar to an action rightly brought, unless title was pleaded in the

(*q*) Order XLI., rule 6, of Judicature Act, 1875.

(*r*) *Lampen* v. *Kedgewin*, 1 Mod. 207; *Buckmaster* v. *Meiklejohn*, 8 Ex. 634; *Burkitt* v. *Blanshard*, 3 Ex. 89; *Marianski* v. *Cairns*, 1 Macq. 212.

(*rr*) *Poyser* v. *Minors*, L. R. 7 Q. B. D. 329.

(*s*) Wilson's Judicature Acts (4th ed.), p. 382.

(*t*) Order XXVI. rule 1.

first action. Thus an action of trepass against a bailee of goods, in which he pleaded not guilty or demurred (*u*), was no bar to a fresh action against him in detinue or account. But where defendant pleaded title in bar to a thing demanded, and, by reason thereof, the plaintiff was barred by demurrer or verdict, the interest thereby was bound, and the plaintiff was barred from bringing a fresh action (*v*). And if a person has more than one civil remedy for the same cause of action, and elects to take one, he cannot afterwards take the other (*x*).

The admissions arising from the pleadings in an action also afford examples of estoppels by record. Formerly, proceedings in actions had to be filed before they could operate as records (*y*). But the procedure is now regulated by the Rules of the Supreme Court of 1883 (*z*). The general rule as to admissions in pleadings and their effect by way of estoppel, is stated by Parke, B., in *Boileau* v. *Rutlin* (*a*). "Pleadings," says the learned Baron, "are not to be treated as positive allegations of the truth of the facts therein for all purposes, but only as statements

(*u*) Demurrers are now abolished, see R. S. C. 1883, Order XXV.

(*v*) *Ferrers* v. *Arden*, 2 Cro. Eliz. p. 668, and Co. Rep. vol. iii. 271. As to records in actions brought in a wrong character, or under a mistake as to the subject-matter, see Vin. Ab. Estop. p. 460, citing Bro. Estop. pl. 168; *Ineledon* v. *Burgess*, Carth. 65, 67; note in Vin. Ab. Former Action, p. 497; *Robinson's Case*, Cro. Jac. 14, and Com. Dig. Tit. Estop. (C).

(*x*) *Goodman* v. *Pocock*, 15 Q. B. 576; per Coleridge, J., at p. 583; *Scarf* v. *Jardine*, L. R. 7 App. Cas. 345; *contra*, *Ex parte Adamson*, *in re Collie*, L. R. 8 Ch. D. 807. As to what amounts to an election, see *Fell* v. *Parkin*, 47 L. T. N. S. 350.

(*y*) Vin. Ab. Tit. Record, p. 172.

(*z*) Ord. XLI.

(*a*) 2 Ex. 665.

of the case of the party to be admitted (*b*), or denied by the opposite side, and, if denied, to be proved, and ultimately submitted for judicial decision. The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation: and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse upon some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated" (*c*).

The older authorities supply abundant illustrations of this statement of the effect of the estoppels raised by pleadings. Thus a supposal did not create an estoppel (*d*).

(*b*) See as to admissions under the R. S. C. 1883, Ord. XXXII. rule 4.

(*c*) An estoppel arising from pleading affects only parties and privies, as stated in Baron Parke's judgment. Thus if B. plead that the contract on which A. is suing him was made by C. as well, and it be found against him, C. cannot plead this finding as an estoppel, when sued by B. for contribution as co-contractor, *Hudson* v. *Robinson*, 4 M. & S. 475. See also as to the effect of pleadings by way of estoppel, Co. Litt. 12 a; *Edwards* v. *Rogers*, Sir W. Jones, 460.

(*d*) Com. Dig. Tit. Pleader, g. 13, where many examples are given. But it is laid down by Lord Coke that matter of estoppel in a count, though it be but by way of supposal, after judgment concludes the parties in another action, but a supposal in a writ does not act as an estoppel after nonsuit; see further as to supposals, Bro. Estop. pl. 138, Vin. Ab. Estop. p. 462.

A plea pleaded was an estoppel; but a plea yet pending and not made a perfect record, by judgment or otherwise, did not cause an estoppel (*e*). Thus, where A. sued B. on two counts, one for rent, and the other for money had and received, and gave particulars on the count for money had and received, but, at the trial, took a general verdict, and for the amount of the rent only, held, in a subsequent action by A. against B. for money had and received, in which the same particulars were delivered as in the former action, that the recovery in the former action was no bar to a recovery in the second action (*f*).

No estoppel arises from pleading matters immaterial (*g*), or unnecessary to be decided in the case (*h*), nor do pleas and verdicts work any estoppel in other actions, respecting matters which are not inconsistent with them (*i*), or upon points not comprised therein (*k*).

If a point has been raised by a plea and traversed, and is decided against the party traversing, he is estopped

(*e*) Bro. Estop. pl. 15; and for the difference between a writ or count and plea pleaded, see 21 Hen. VII. 24, 25, and *Trevivian* v. *Lawrence*, 1 Salk. 276; and for an example of an estoppel by appearance and pleading to an action, see Jenkins's Rep. 113, Case XX.

(*f*) *Hadley* v. *Green*, 2 Cr. & J. 374. In order that an estoppel may be raised, the matters in question must not only have been controverted before a court of competent jurisdiction, but must actually have been decided thereby: per Willes, J., in *Langmead* v. *Maple*, 18 C. B. N. S. 255, 270.

(*g*) Bro. Estop. pl. 103 and 148.

(*h*) *Morgan* v. *Vaughan*, Sir T. Raymond, 456.

(*i*) Vin. Ab. Estop. pp. 432, 433, and Bro. Estop. pl. 191.

(*k*) Vin. Ab. Estop. pl. 27; *Watkins* v. *Oliver*, Cro. Jac. p. 558; Buller's N. P. p. 233; and Co. Litt. 227 b.

from raising the same point in a subsequent action between the same parties (*l*). So a party may not plead matters which are inconsistent with his pleadings in a former action between the same parties (*m*). And a material statement made by one side and accepted and relied upon by the other, estops the party making it from denying it in a subsequent action (*n*), even if the statement made was a mistaken one (*o*).

But a party would not be estopped from subsequently raising any point which the Court did not decide, and which neither side were bound to raise (*p*). For example, where by statute matters may be determined either by the County Court or the magistrates, and the matter has been decided upon in the County Court, the magistrates are not thereby estopped from deciding a point which was not raised, and which neither side was bound to raise, before the County Court judge (*q*).

Where a party to an action does not answer in his pleadings his opponent's allegations, he is estopped from afterwards denying them (*r*). And where a party did

(*l*) Bro. Estop. pls. 13, 77, and p. 432; Vin. Ab. Estop. p. 432; *Eastmure* v. *Laws*, 5 Bing. N. C. 450; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29.

(*m*) Bro. tit. Mortdancestor, pl. 56; *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56. An exception was, however, formerly made in the case of special defences to certain real actions, see Bro. Estop. pls. 77, 138, 140; unless defendant, instead of raising a special defence to the first action, traversed the whole of it, see *ibid.*

(*n*) Bro. Estop. pl. 124.

(*o*) *Reynolds* v. *Blackburn*, 7 A. & E. 161.

(*p*) Per Willes, J., in *Langmead* v. *Maple*, 18 C. B. N. S. 255, at p. 270 Nor from raising points which the Court could not decide from want of jurisdiction, *Blake* v. *O'Kelly*, 9 Ir. R. Eq. 54.

(*q*) *Hindley* v. *Haslem*, L. R. 3 Q. B. D. 481.

(*r*) Bro. Estop. pl. 151; Vin. Ab. Estop. p. 429; *Cowlishaw* v.

not answer in his pleading an objection, raised by his opponent, to his title, but set up another title, he was considered to have confessed the objection, and to be estopped from afterwards denying its validity (*s*).

Default and omissions in pleading.—By the Rules of the Supreme Court 1883, if plaintiff fails to deliver a statement of claim within the proper time, the Court or a judge may, upon application being made to him by defendant, order the action to be dismissed for want of prosecution, or make such other order as he thinks just (*t*). And by the same rules provision is made for the entry by plaintiff (or other parties) of judgment, upon defendant (or the opposite party, as the case may be) failing to deliver a pleading within the proper time (*u*).

The question how far a defendant, by omitting to plead a defence which he has the opportunity of pleading, is precluded from raising the same defence subsequently, is one which admits of some discussion. It seems that he is at any rate precluded by his omission, from raising the defence in proceedings which are founded on the action in which the omission occurred, as, for instance, in

Cheslyn, 1 Cr. & J. 48; and see now R. S. C. 1883, Order XIX., rule 13. And, as to not taking objections to the opponent's pleading, see Bro. Fauxifier de Recovery, pl. 39. Points of law should now be raised on the pleadings, demurrers being abolished, see R. S. C. 1883, Order XXV., rules 1, 2.

(*s*) Vin. Ab. Estop. p. 433. A party was not, however, estopped by *nient dedire* of a thing which he had no opportunity of traversing, Vin. Ab. Estop. p. 158.

(*t*) R. S. C. Order XXVII., rule 1. But such dismissal is not a bar to subsequent proceedings in respect of the same matter, *Re Orrel Colliery and Firebrick Co.*, L. R. 12 Ch. D. 681.

(*u*) R. S. C. Order XXVII., rules 2 to 14.

proceedings of *scire facias* upon the judgment in the action (*x*), or in an action brought upon the judgment itself (*y*). And it appears from the older authorities, that where defendant appeared and pleaded in an action, and a matter was put in issue between him and the plaintiff, and defendant omitted to plead a defence which he might have pleaded, and verdict was given against him, that he was estopped from setting up the defence in a subsequent action brought against him by the same plaintiff (*z*). And the same was held where defendant appeared, and pleaded to issue, although he made default at the trial (*a*). But where plaintiff brought an action for rent under an agreement for a lease, and defendant appeared and applied for time to plead, but failed to plead, and plaintiff signed judgment against him by default, it was held, in a subsequent action by plaintiff against defendant for another instalment of rent due under the same agreement, that defendant was not estopped from disputing the agreement and setting up another one in its stead, by having omitted to set up the defence in the former action (*b*).

In accordance, therefore, with the above decision, it appears that the mere omission by a defendant to set up a defence in one action, does not necessarily preclude him from setting it up in another action brought against him by the same plaintiff.

And the mere omission by a defendant to plead

(*x*) Per L. C. in *Ramsden* v. *Jackson*, 1 Atk. 292.

(*y*) *Jewsbury* v. *Mummery*, L. R. 8 Q. B. 56.

(*z*) Vin. Ab. Estop. p. 433.

(*a*) Bro. Estop. pl. 190.

(*b*) *Howlett* v. *Tarte*, 10 C. B. N. S. 813.

matters by way of set-off or counterclaim, does not estop him from bringing a subsequent action against plaintiff in respect of such matters (*c*).

But as far as the action is concerned in which the omission occurred, neglect in omitting to set up a defence at the proper time (after the time for amendment has gone by) is irremediable (*d*); and if, in consequence of the omission, plaintiff has recovered judgment for a sum of money, defendant cannot recover it back in a subsequent action for money had and received (*e*).

In the spiritual courts, on the other hand, neither pleas in prohibition (*f*) nor sentences of divorce and the like were matters or judgments of record (*g*). Thus a testament proved under the seal of the ordinary was no estoppel to prevent the plaintiff from saying that the testator died intestate, or from denying that the plaintiff was executor, as it was not a matter of record (*h*).

Particular instances of record are afforded by fines, recoveries, recognizances, letters patent, &c.

(*c*) *Davis* v. *Hedges*, L. R. 6 Q. B. 687; *Hindley* v. *Haslem*, L. R. 3 Q. B. D. 481.

(*d*) *Philpot* v. *Aslett*, 1 C. M. & R. 85; *Denne* v. *Knott*, 7 M. & W. 143; *Lane* v. *Chapman*, 11 A. & E. 966.

(*e*) *Marriott* v. *Hampton*, Smith's L. C. (8th ed.) vol. ii., p. 421; *Wilson* v. *Ray*, 10 A. & E. 82.

(*f*) Vin. Ab. Record, p. 171.

(*g*) See Wentworth's "Office of Executor" (Curson's ed., 1728), and *Robins* v. *Crutchley*, 2 Wils. 118, and see Appendix B, p. 418. The rule appears to have been as follows: "*Sententia contra matrimonium nunquam transit in rem judicatam.*" Such sentences were, however, usually conclusive if given in evidence.

(*h*) Bro. Estop. pl. 12; and Wentworth's "Office of Executor" (Curson's ed., 1728), p. 48. The seal of the ordinary was, however, conclusive as to the authenticity of the will; *Noel* v. *Wells*, 1 Levinz, 235; and see *Phillips* v. *Chichester*, Appendix A, p. 407.

Thus a fine was a record (*i*); and it bound those who claimed under him who levied the fine (*k*). For instance, if a fine were levied by grant and render to A. for years, remainder to B. in fee, even if A. was before seised in fee, he was estopped by the fine from claiming a larger estate than an estate for years (*l*). And even contingent or executory interests, or possibilities, in lands of inheritance might be passed at law by fine by way of estoppel (*m*).

So also a common recovery was a record and operated by way of estoppel (*n*). And even a void recovery might create an estoppel (*o*). A recognizance too is a record upon the taking it, and before the enrolment (*p*). So also are letters patent (*q*).

However, a mere licence or charter of alienation was no record, and no estoppel was created thereby (*r*).

(*i*) Vin. Ab. Record, p. 171; citing Bro. Record, pl. 78.

(*k*) Vin. Ab. Estop., p. 480; citing *Edwards* v. *Rogers*, Cro. Car. pp. 524 & 543; and see *Hubert's Case*, Cro. Eliz. p. 531; *Edwards* v. *Rogers*, *ibid.* And see *Sir G. Brown's Case*, Co. Rep., vol. ii., pp. 138 & 163; and *Linch* v. *Spencer*, Cro. Eliz. p. 513.

(*l*) Per Anderson, C.J., 2 And. 79; *Hume* v. *Burton*, 1 Ridgway's P. R. 567; and see other instances cited in Vin. Ab. Estop. pp. 432, 443; Ro. Ab. Estop. p. 863; 2 Ro. Ab. p. 16, pl. 17; and Brooke's New Cases, p. 108.

(*m*) Noy's Maxims (ed. of 1821), p. 117, and references there given. And see further as to estoppels by fine, *Helps* v. *Hereford*, 2 B. & Ad. 242.

(*n*) *Duke* v. *Smith*, 4 Leon. 238. *Doe*, d. *Daniel* v. *Woodroffe*, 2 H. L. Cas. 811.

(*o*) Vin. Ab. Estop. p. 431.

(*p*) *Buston* v. *Ridley*, 11 Mod. 224; and see further as to estoppel by recognizance, *Freke* v. *Finch*, Freeman's Rep. 375; *Henriques* v. *Dutch West India Co.*, 2 Ld. Raymd. 1535.

(*q*) Ro. Ab. Estop. p. 864; Bro. Estop. pl. 144; and Bro. Estop. Tit. Office devant escheator, pl. 23. But letters patent are no estoppel to a stranger, Bro. Estop. pl. 52.

(*r*) Bro. Estop. pl. 134.

And even an affidavit which has been read and filed becomes a record of the court, and cannot be taken off the file (*s*). But a statement in an affidavit in an action between A. and B., though evidence, is not conclusive, in a subsequent action between A. and C. (*t*).

A general Act of Parliament is a record to which every one is privy, and therefore *nul tiel record* was not pleadable to it (*u*).

A distinction, however, must be drawn between public and private Acts of Parliament. Thus, it has been held that a recital in a public Act of Parliament acts as an estoppel, or is at any rate admissible evidence concerning the matters therein recited, as between all persons (*x*). But the statement of a fact in the schedule to an Act of Parliament is not conclusive evidence of that fact (*y*). Nor is a mere recital in a local and personal public Act, either of fact or law (*z*).

And statements contained in private Acts of Parliament do not bind strangers, so as to prejudice their interests (*a*). But they may be admissible in evidence against classes

(*s*) *Beale* v. *Langstaffe*, 2 Wils. 371.

(*t*) *Morgan* v. *Couchman*, 23 L. J. C. P. 36; and see *Richards* v. *Morgan*, 4 B. & S. 641.

(*u*) *Prince's Case*, Co. Rep., vol. iv., 168; *Woolsey's Case*, Godbolt's Rep., 178.

(*x*) Bro. Estop. pl. 155; *R.* v. *Sutton*, 4 M. & S. 532, 549; and see as to the effect of the rehearsal or preamble, Co. Litt. 19 b.

(*y*) *R.* v. *Greene*, 6 A. & E. 548.

(*z*) Vin. Ab., vol. xix., p. 507; *R.* v. *Haughton*, 1 E. & B. 510; contra, Bro. Tit. Parlt., citing 9 H. 7, 2.

(*a*) *Lucy* v. *Levington*, 1 Ventris, 176; *Barrington's Case*, Co. Rep., vol. iv., p. 413 (esp. at p. 416, note B); *Brett* v. *Beales*, Moo. & Mal. 421; *Ballard* v. *Way*, 1 M. & W. 520; *Duke of Beaufort* v. *Smith*, 4 Ex., at p. 170; *Nicholls* v. *Milford*, L. R. 20 Ch. D. 380.

of persons whose interests are intended to be affected by them (*b*).

It is, perhaps, owing to the above rule, viz., that an Act of Parliament is a record to which every one is privy, that the doctrine of estoppel has been considered to have no application, so as to permit parties to a contract to estop themselves in face of an Act of Parliament. However, whatever its origin, such a rule has been laid down (*c*).

There are other instances where the proceedings of bodies other than courts of justice have been held conclusive (*d*).

Thus, where an agreement was entered among the other proceedings and orders of the court of aldermen being a court of record, it became a matter of record (*e*).

And certain official acts of a public nature, when recorded, create an estoppel against those by whom they were done. An example of this is furnished by a sheriff's return. Thus, in an action brought against a sheriff for making a wrong return, the return is conclusive against him (*f*). And in some of the older authorities it is laid down that no averment in pleading could be taken against a sheriff's return appearing by record; and that, if the return was wrong, the proper remedy was by action (*g*).

(*b*) *Brett* v. *Beales, Duke of Beaufort* v. *Smith, supra*; *Earl of Carnarvon* v. *Villebois*, 13 M. & W. 313; cf. per Erskine, J., in *Taylor* v. *Parry*, 1 M. & G. 604.

(*c*) *In re Stapleford Colliery Co., Barrow's Case*, L. R. 14 Ch. D., at p. 111.

(*d*) *R.* v. *Grundon*, 1 Cowp. 315.

(*e*) *Frederick* v. *Frederick*, 1 P. Wms. 710.

(*f*) *Woodgate* v. *Knatchbull*, 2 T. R. 148; *Clerk* v. *Withers*, 6 Mod. 296; *Field* v. *Smith*, 2 M. & W. 388.

(*g*) Lofft's Rep. 372. Tit. Return;

Thus, where a sheriff returned A. B. as guilty of a rescue, an attachment of course issued against A. B. on the return, and he was imprisoned, and subsequently fined in the Queen's Bench without being allowed to traverse the return (*h*). But the rule was that a return was only conclusive in the cause in which it was made, and not in actions or proceedings to which the sheriff was not a party (*i*). Thus, a return that A. B. was guilty of a rescue, might be traversed in a subsequent indictment against A. B. for the offence (*k*).

And it appears that now a sheriff's return is not necessarily conclusive against him, except in the case above-mentioned, either in actions brought by the sheriff (*l*), or against him (*m*), although they arise out of the execution on which the return was made.

The award of an arbitrator is conclusive between the parties for certain purposes, but does not create any merger of the original cause of action (*n*). And, although the award of an arbitrator on a matter of title referred to him, is conclusive evidence as to the title in a subse-

Flud v. *Pennington*, 2 Cro. Eliz. 872; *Harrington* v. *Taylor*, 15 East, 378; *Whitrong* v. *Blaney*, 2 Mod. 11; 2 Inst. 452. See contra Com. Dig. Return (G), p. 290; 2 Ro. Ab. Return, p. 462.

(*h*) *R.* v. *Elkins*, 4 Burr. 2129.

(*i*) *Jackson* v. *Hill*, 10 A. & E. 177.

(*k*) *Gyfford* v. *Woodgate*, 11 East, 297.

(*l*) *Standish* v. *Ross*, 3 Ex. 527.

(*m*) *Brydges* v. *Walford*, 6 M. & S. 42. And actual damage must be shown; *Stimson* v. *Farnham*, L. R. 7 Q. B. 175.

(*n*) *Allen* v. *Milner*, 2 C. & J. 47; *Gascoigne* v. *Edwards*, 1 Y. & J. 19; *Parkes* v. *Smith*, 19 L. J. Q. B. 405. So, too, an action might be brought on a reference at *nisi prius*, afterwards made a rule of court, if the rule was made with the consent of the parties, *Tremenhere* v. *Tresillian*, 1 Siderfin, 452.

quent action of ejectment between the parties (*o*), it is not as a rule conclusive generally as to title or property. Thus, property does not pass by the mere force of an award, so as to prevent an action of trover being maintainable for its recovery subsequent to the award (*p*). And where a bill in chancery was filed by A. against B. for infringement of a patent, and the matter being referred to arbitration, the arbitrator, after hearing the arguments, awarded that the letters patent which had been granted for the invention were not illegal or void, it was held that in subsequent proceedings by A. against B. for another infringement of the same patent, B. was not estopped by the award from pleading, *inter alia*, that the invention was not one for which letters patent could be legally granted (*q*).

The award, however, by an arbitrator, of a money claim, is conclusive as to the amount awarded, and, therefore, precludes the party to whom the sum is awarded, from bringing a subsequent action for a larger amount than the sum awarded (*r*). Thus where A. and B. submitted the amount of damages accruing from a breach of covenant between them to an arbitrator, it was held that in an action on the covenant, the arbitrator's award was conclusive as to the amount of damages, unless the award itself could be impeached (*s*). And it may be stated generally, that in all

(*o*) *Doe* d. *Morris* v. *Rosser*, 3 East, 15.

(*p*) *Hunter* v. *Rice*, 15 East, 100; *Thorpe* v. *Eyre*, 1 A. & E. 926.

(*q*) *Newall* v. *Elliot*, 32 L. J. Ex. 120.

(*r*) Per Lush, J., in *Commings* v. *Heard*, L. R. 4 Q. B. 669; *Gascoyne* v. *Edwards*, 1 Y. & J. 19; *Parkes* v. *Smith*, 19 L. J. Q. B. 405.

(*s*) *Whitehead* v. *Tattersall*, 1

actions where damages only are to be recovered, arbitrament, or accord with satisfaction, is a good plea (*t*).

As an award creates no merger of the original cause of action, the mere fact that the award was made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of the action was not laid before the arbitrator, nor included in the matters referred (*u*). But where all matters in difference were referred to arbitration, and the subject in question was a matter of difference at the time, and within the scope of the reference, and the defendant might have brought the whole under the consideration of the arbitrator, but kept part of it back, he was precluded from using the amount kept back as a set-off, and from claiming a deduction in respect thereof in proceedings of attachment against him for non-payment of the sum awarded (*x*).

As regards the effect of the judgments or decisions of courts of inferior or limited jurisdiction, it may be observed in the first place, that the proceedings of a court of inferior jurisdiction must show, upon the face of them, that the court had jurisdiction in the matter which

Ad. & E. 491. See further as to awards, Com. Dig. Tit. Arbitrament, vol. i., p. 208; *Crofts* v. *Harris*, Carth. 187.

(*t*) *Blake's Case*, Co. Rep. vol. iii. 342; *Morris* v. *Creach*, 1 Levinz, 292. As to a conditional award, see *Crofts* v. *Harris*, Carth. 187.

(*u*) *Rawe* v. *Farmer*, 4 T. R. 146; and *Golightly* v. *Jellicoe*, note *ibid.*

(*x*) *Smith* v. *Johnson*, 15 East, 213; *Dunn* v. *Murray*, 9 B. & C. 780. As to the conclusiveness of the finding on a reference, see *Ex parte Harper, re Bremner*, L. R. 10 Ch. App. 379.

it professed to decide, or they are altogether void ,(*y*) unless, in the course of such proceedings, there has been a waiver by the opposite party of any objection to the jurisdiction (*z*).

The light in which judgments of courts of limited jurisdiction are regarded by the High Court, is well explained by Lord Brougham, in his judgment in *Taylor* v. *Clemson* (*a*). He says: "Now it cannot be doubted, that where a court of limited jurisdiction, limited either in point of place or of subject-matter, assumes to proceed, its judgment must set forth such facts as show that it has jurisdiction, and must show also in what respect it has jurisdiction. But it is another thing to contend that it must set forth all the facts or all the particulars out of which its jurisdiction arises. Thus, if a power of commitment, or other power, is given to two justices of a county, their conviction or their order must set forth that they are two such justices of such county, in order that it may be certainly known whether or not they constitute the tribunal upon which the statute they assume to act under has conferred the authority to make that order, or to pronounce that conviction." And again, later on in his judgment, he says: "It is necessary that the jurisdiction should appear, but there is no particular form in which it must be made to appear. The Court above, which has to examine, and may control, the inferior Court, must be enabled, somehow or other, to see that there is jurisdiction, such

(*y*) Per Tindal, C. J., in *Taylor* v. *Clemson*, 2 Q. B. at p. 1031.

(*z*) *Taylor* v. *Clemson*, 11 Cl. & Fin. at p. 614.

(*a*) 11 Cl. & Fin. at p. 640.

jurisdiction as will support the proceeding: but in what way it shall so see is not material, provided that it does so see" (*b*).

And in an important case (*c*), in which the jurisdiction of the Mayor's Court (*d*) was in question, the judges said: "The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is expressly so alleged. Another distinction is that whereas the judgment of a superior Court, unreversed, is conclusive as to all relevant matters thereby decided, the judgment of an inferior Court, involving a question of jurisdiction, is not final. If the decision be for the defendant, there is nothing to estop the plaintiff from suing over again in a superior Court, and insisting that the decision below had turned, or might have turned, upon jurisdiction. If the decision were in favour of the

(*b*) 11 Cl. & Fin. at p. 641; see also the cases referred to by Ld. Cottenham in his judgment, at pp. 647, *et seq.*

(*c*) *Mayor, &c., of London* v. *Cox*, L. R. 2 H. L. 239. And see the opinions of the judges at p. 259, citing *Peacock* v. *Bell*, 1 Wm. Saund. pp. 97, *et seq.* But even courts of general jurisdiction may exceed their jurisdiction, and in such case their decrees, &c., will be null and void: see the judgment of James, L. J., in *Robinson* v. *Dalcep Singh*, L. R. 11 Ch. D. at p. 813.

(*d*) From the above case it appears that the Mayor's Court is a local and inferior court, subject to the jurisdiction of the High Court. See, however, as to appeals from the Mayor's Court, *Le Blanch* v. *Reuter's Telegraph Co.*, L. R. 1 Ex. D. (C.A.) 408; *Appleford* v. *Judkins*, L. R. 3 C. P. D. (C.A.) 189; *Pryor* v. *City Offices Co.*, L. R. 10 Q. B. D. (C.A.) 504.

plaintiff, it is still not conclusive, because the rule that, in inferior Courts and proceedings by magistrates, the maxim *omnia præsumuntur rite esse acta* does not apply to give jurisdiction, never has been questioned" (*e*). And later on in their opinions they say (*f*), "So, in an action brought in a superior Court upon a judgment of an inferior Court, it must be again averred that the original cause of action arose within the jurisdiction of the inferior Court, so that upon a traverse of that averment the question of jurisdiction may be retried."

The want of jurisdiction in an inferior Court may be shown by collateral facts (*g*), and in any collateral proceedings (*h*). As examples of judgments of Courts of inferior jurisdiction, we will consider the effect of

(α.) Judgments in County Courts.

(β.) Decisions of Justices.

(α.) *Judgments in the County Courts.*—A judgment of the old County Court, which was not a court of record, was not conclusive, but was at any rate liable to be impeached by the subsequent finding of a jury at *nisi prius*, amounting to a finding that the judgment had been obtained by fraud (*i*).

An action, however, might be brought upon it, as

(*e*) See per Holroyd, J., in *R.* v. *All Saints, Southampton*, 7 B. & C. 785; *R.* v. *Bolton*, 1 Q. B. 66; *Chew* v. *Holroyd*, 8 Ex. 249, per Parke, B.

(*f*) L. R. 2 H. L. at p. 263.

(*g*) Per Patteson, J., in *In re Clarke*, 2 Q. B. at p. 635; *Frumpton* v. *Pettis*, 3 Levinz, 23.

(*h*) Per Blackburn, J., in *Revell* v. *Blake*, L. R. 8 C. P. 533, at p. 544.

(*i*) Per Taunton, J., in *Thompson* v. *Blackhurst*, 1 N. & M. at p. 273.

explained by Parke, B., in *Williams* v. *Jones* (*k*). He says, "The principle on which this action is founded is, that where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts are supported and enforced, and the same rule applies to inferior Courts in this country, and applies equally whether they be courts of record or not."

The modern County Court, however, established by Act of Parliament, is a court of record. And its judgments upon matters within its jurisdiction, are conclusive as judgments of a court of record *inter partes* (*l*).

But the order of a County Court judge, under 19 & 20 Vict. c. 108, ss. 50 & 51, for delivery up of possession of premises by the tenant, is not analogous to a judgment in ejectment, so as to entitle the landlord to maintain a subsequent action thereon for mesne profits, nor is it conclusive as to the landlord's right to possession, in a subsequent action for mesne profits, brought by him against the tenant (*m*). For the County Court judge is, in the exercise of this peculiar statutory jurisdiction, in a similar position to a magistrate having statutable authority to order possession of premises to be delivered up (*n*).

(*k*) 13 M. & W. 628, at p. 633; see also judgment of Alderson, B., at p. 634.

(*l*) *Routledge* v. *Hislop*, 2 E. & E. 549; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29; *Clarke* v. *Yorke*, 31 W. R. 62.

(*m*) *Campbell* v. *Loader*, 34 L. J. Ex. 50.

(*n*) Per Channell, B., in *Campbell* v. *Loader*, *ibid.*; *Hodson* v. *Walker*, L. R. 7 Ex. 55.

(β.) *Decisions of Justices.*—In accordance with what Lord Brougham stated in *Taylor* v. *Clemson* (*o*) concerning Courts of limited jurisdiction, the fact that justices have jurisdiction in a matter must appear upon the face of an order made by them (*p*). And orders made by them on matters outside their jurisdiction, are of no binding effect. Thus an order made by magistrates for payment of rates, against a person who disputed the validity of the rates, being outside their jurisdiction was held not to be *res judicata*, so as to oust the jurisdiction of the Arches Court (*q*). But in ordinary cases where the jurisdiction of an inferior tribunal, as of magistrates at petty sessions, depends on some fact into which it is their duty to enquire as essential to their jurisdiction, the determination of that tribunal, after *bonâ fide* investigation as to such fact, is conclusive as to the existence of jurisdiction, so far as that fact is concerned (*r*). And the decisions of magistrates upon matters within their jurisdiction may be binding on a civil Court (*s*). It has, however, been held that a refusal of a magistrate to make an

(*o*) 11 Cl. & Fin. at p. 640, and *ante*, p. 44.

(*p*) *R.* v. *St. George, Bloomsbury*, 4 E. & B. 520; *Parish of Staverton* v. *Parish of Ashburton*, 4 E. & B. 526.

(*q*) *Linnell* v. *Gunn*, L. R. 1 Adm. & Eccles. 363.

(*r*) See per Bovill, C. J., in *Revell* v. *Blake*, L. R. 7 C. P. at p. 310, citing *R.* v. *Bolton*, 1 Q. B. 66; see also *Ex parte Wake*, L. R. 11 Q. B. D. 291.

(*s*) *Wright* v. *London General Omnibus Co.*, L. R. 2 Q. B. D. 271; *Great Northern Steamship Fishing Co.* v. *Edgehill*, L. R. 11 Q. B. D. 225; and see *Wildes* v. *Russell*, L. R. 1 C. P. 744, as to the judgment of a court of Quarter Sessions.

order for delivery up of property, under 2 & 3 Vict. c. 71, s. 40, is no bar to an action by the applicant in trover (*t*). But a certificate of conviction or dismissal by a magistrate, in certain cases of aggravated assault, is by statute a bar to a subsequent civil action (*u*).

A conviction drawn up by a justice in due form, and remaining in force, is a protection in any action brought against him for the act so done (*v*). But in order that the conviction may have this conclusive effect, no defect must appear on the face of it (*x*); and the justice must have been unaware of any defect of jurisdiction, if any (*y*), and he must have been acting in a judicial capacity (*z*). For example, by the Highway Act (5 & 6 Will. 4, c. 50, s. 73), it was enacted that if any timber, &c., was laid upon the highway so as to be a nuisance, and was not, after notice given, removed, the surveyor, by order in writing from a justice, might remove the same. A justice having, under the said Act, made an order in writing for the removal of the plaintiff's timber, in which order it was recited that the plaintiff's timber was laid upon the highway, and the timber having accordingly been removed, it was held, in an action of trespass against the justice, that the plaintiff could not give evidence, in

(*t*) *Dover* v. *Child*, L. R. 1 Ex. D. 172.

(*u*) 24 & 25 Vict. c. 100, s. 45; *Holden* v. *King*, 16 L. J. Ex. 75; *Masper* v. *Brown*, L. R. 1 C. P. D. 97.

(*v*) *Baston* v. *Carew*, 3 B. & C. at p. 652; see also Jervis's Act, 11 & 12 Vict. c. 44.

(*x*) *Brittain* v. *Kinnaird*, 1 B. & B. 432; *In re Clarke*, 2 Q. B. pp. 633, 634.

(*y*) See *Mayor, &c., of London* v. *Cox*, L. R. 2 H. L. at p. 263.

(*z*) Pitt-Taylor on Evidence (7th ed.), vol. ii. p. 1397.

contradiction to the order, to show that the *locus in quo* was not a highway (*a*).

The above rule, affording protection to justices in respect of acts done in their judicial capacity, is only part of a general rule of law, that a judicial officer cannot be sued for an adjudication according to the best of his judgment, upon a matter within his jurisdiction, and that a matter so adjudicated by him cannot be put in issue against him (*b*); and the same rule has been applied in the case of judges of courts martial (*c*); coroners (*d*); commissioners of courts of request (*e*); and also in the case of judicial acts performed without fraud (*f*), and words spoken by a judge in his judicial capacity (*g*). The rule, however, only applies if the judicial officer has acted within his jurisdiction, and want of jurisdiction may be shown (*h*).

(*a*) *Mould* v. *Williams*, 5 Q. B. 469.

(*b*) Per Erle, C. J., in *Kemp* v. *Neville*, 31 L. J. C. P. 158.

(*c*) *Jekyll* v. *Moore*, 2 B. & P. N. R. 341.

(*d*) *Garnett* v. *Ferrand*, 6 B. & C. at p. 625.

(*e*) *Aldridge* v. *Haines*, 2 B. & Ad. 395.

(*f*) *Penney* v. *Slade*, 5 Bing. N. C. 469.

(*g*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220.

(*h*) *Andrews* v. *Marris*, 1 Q. B. 3. The distinction between cases where there is an inherent want of jurisdiction on account of the nature of the complaint, and where there is want of jurisdiction merely because the facts do not make out the charge, is explained in *R.* v. *Bolton*, 1 Q. B. 66, and *Brittain* v. *Kinnaird*, 1 B. & B. 432; see also Ld. Coleridge's judgment in *Usill* v. *Hales*, 14 Cox, 64.

CHAPTER III.

DOMESTIC JUDGMENTS IN PERSONAM.

It is laid down in the *Duchess of Kingston's Case* (*a*) that a record, in order to operate as an estoppel in subsequent proceedings in another court, must be that of a court having either exclusive jurisdiction over the subject-matter of the estoppel, or a jurisdiction concurrent with that of the Court in which it is sought to raise the estoppel. We propose to consider, in this chapter, the effect of domestic judgments *in personam* or *inter partes*, and, in the following chapter, the effect of domestic judgments *in rem*.

As to the parties to an action.—As regards judgments *in personam* or *inter partes*, the general rule is, that an allegation upon record, upon which issue has been once taken and found, is, between the parties taking it and their privies (*b*), conclusive according to the finding thereof, so as to estop the parties from again litigating that fact once so tried and found (*c*).

In considering who are the parties bound by a judg-

(*a*) Appendix B, pp. 110, *et seq.*

(*b*) Bro. Estop. pl. 162; *Cary* v. *Dancy*, 2 Cro. Eliz. 471; *Hudson* v. *Robinson*, 4 M. & S. 475, at pp. 479, 485.

(*c*) Per Ld. Ellenborough in *Outram* v. *Morewood*, 3 East, 346; per Parke, B., in *Boileau* v. *Rutlin*, 2 Ex. 665; *Burrows* v. *Jemino*, 2 Str. 733, Appendix B, p. 415; *Flitters* v. *Allfrey*, L. R. 10 C. P. 29.

ment *in personam*, the question to be determined is, who were the real parties to the suit (*d*). At all events, the parties must be substantially the same (*e*). And, in order to constitute a person a party so that a judgment may be used against him, he must have taken some part in the proceedings, in which the judgment was given (*f*). But whenever a person sues, not in his own right, but in the right of another, he must, for the purposes of estoppel, be deemed a stranger (*g*).

And if a man mistook his action by bringing an action as administrator, whereas in truth he was executor, he was not debarred, by judgment for the defendant on demurrer, from bringing a fresh action as executor (*h*).

So also the defendants, in an action brought by the plaintiff as administratrix generally, were not estopped by the judgment in a previous action brought against them by the plaintiff, suing as administratrix under Lord Campbell's Act (*i*).

Lord Coke classes privies under the three heads of 1. Privies in blood; 2. Privies in law; and 3. Privies by estate. But as regards estoppel, the same doctrine applies to each class, viz., that one who claims through

(*d*) *Kinnersley* v. *Orpe*, 2 Dougl. 517.

(*e*) Per Parke, B., in *Simpson* v. *Pickering*, 1 C. M. & R. 529.

(*f*) *Doe* d. *Smith* v. *Webber*, 1 A. & E. 119.

(*g*) Vin. Ab. Estop. p. 432, citing Bro. Estop. pl. 140; Com. Dig. Estop. p. 195; *Metters* v. *Brown*, 1 H. & C. 686.

(*h*) *Robinson's Case*, Co. Rep., vol. iii. p. 66; Com. Dig. Tit. Estop. (C.). Demurrers are now abolished, see R. S. C., 1883, Order XXV., rule 1; and see as to the practice now, R. S. C., 1883, Order XXI., rule 5.

(*i*) *Leggott* (administratrix) v. *G. N. R. Co.*, L. R. 1 Q. B. D. 599; 45 L. J. Q. B. 557. And see *Ferrers* v. *Arden*, 2 Cro. Eliz. p. 668; Co. Rep., vol. iii. 271.

another is, to the extent of his claim, subject to, and able to take advantage of, all estoppels affecting the person through whom he claims.

Thus, as an example of the first class, viz., privies in blood, an heir is estopped by a verdict against his ancestor through whom he claims (*j*). But not if he does not claim under the ancestor (*k*).

Again, as an example of the second class, viz., privies in law, an executor or administrator is bound by a verdict against his testator or intestate (*l*). So also a verdict against a wife was held to bind a future husband (*m*). And a judgment of ouster against one member of a corporation is conclusive evidence against another who derives title under him (*n*).

Further, as an example of the third class, viz., privies in estate, if several estates in remainder be limited in a deed, and one of the remaindermen obtains a verdict in an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainderman in an action brought against him for the same land, though he does not claim any estate under the first remainderman, because they all claim under the same deed (*o*). But there is no such privity

(*j*) *Locke* v. *Norbonne*, 3 Mod. 141; *Bell* v. *Harwood*, 3 T. R. 308; Com. Dig. Tit. Estop. p. 194, notes *r*, *s*, and *t*.

(*k*) *Spencer* v. *Williams*, L. R. 2 P. & D. 230.

(*l*) *R.* v. *Hebden*, Buller's N. P. 231; Andrew, 388; 2 Str. 1109.

(*m*) *Outram* v. *Morewood*, 3 East, 346; and see Co. Litt. 352 a.

(*n*) *R.* v. *Mayor, &c., of York*, 5 T. R. 66 and 72; but see *R.* v. *Grimes*, 5 Burr. 2601.

(*o*) *Pyke* v. *Crouch*, 1 Ld. Raymd. 730; 8 Wil. iii. On the same principle, a remain-

of estate between a tenant for life and a reversioner (*p*). So also in a bill claiming tithes, a former verdict between the parson and another occupier was admitted as evidence on the point "whether the payment called the tilth-penny was paid and payable in lieu of tithe-hay" (*q*).

The rule that a record *inter partes* binds parties and privies, is subject to the general limitation that no one can plead a record for estoppel, unless he himself may be estopped by it (*r*). Thus it has been laid down that nobody can take benefit by a verdict, that would not have been prejudiced by it, had it gone contrary (*s*).

For an example, a stranger to a record *inter partes* cannot take advantage of an estoppel arising therefrom (*t*). Neither, it appears, is he bound by any estoppel arising therefrom (*u*).

The general rule is laid down in the opinions of the

derman, after a tenant in tail, was not a competent witness for the tenant in tail in ejectment for the entailed property. *Doe* d. *Teynham* v. *Tyler*, 6 Bing. 390.

(*p*) Buller's N. P. 232 a.

(*q*) *Travis* v. *Chaloner*, Gwillim on Tithes, vol. iii. 1237. For other examples of privies by estate, see *Blakemore* v. *Glamorganshire Canal Co.*, 2 C. M. & R. 133; *Helps* v. *Hereford*, 2 B. & Ad. 242.

(*r*) Bro. Estop. pl. 15; *Rushworth* v. *Pembroke*, Hardres, 472.

(*s*) Per Coleridge, J., in *Wenman* v. *Mackenzie*, 5 E. & B. 158, citing Gilbert on Evidence.

(*t*) Bro. Estop. pls. 64, 223. The reason given in the old authority, why a stranger cannot take advantage by estoppel of a record upon verdict, is, that the verdict might be reversed by error or attaint, but that the stranger could not reverse it, see *ibid.*

(*u*) Vin. Ab. Estop. pp. 444, 446; Bro. Estop. pls. 15, 44, 105, 169; Co. Litt. 352 a. See, *contra*, the rule laid down in *Bull* v. *Wyatt*, Cro Car. 338 (cited in Vin. Ab. Estop. p. 442), to the effect that an estoppel by record binds all strangers who would not be disinherited by it.

judges in the *Duchess of Kingston's Case* (*x*) as follows: —"It is a general rule, with certain exceptions, that a transaction between two parties in judicial proceedings, ought not to bind a third. For it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous: and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of a court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers."

The reason why an estoppel *per rem judicatam* is limited in its effect to parties and privies, is because it is dependent upon the principle, "Res inter alios acta alteri nocere non potest" (*y*). So too, it is stated elsewhere, that the verdict ought to be between the same parties, because otherwise a man might be bound by a decision, who had not the liberty to cross-examine: and that nothing can be more contrary to natural justice, than that a man should be injured by a determination, that he, or those under whom he claims, were not at liberty to controvert (*z*).

A distinction was formerly drawn between the effect by way of estoppel upon third parties of a record in a real, and in a personal action (*a*). Thus, if A. brought

(*x*) 20 St. Tr. pp. 355—651; 2 Smith's L. C. (8th ed.), p. 784 *et seq.*; 1 Leach, C. C. 146. And see also the rule as to the admissibility of depositions, &c., in other actions, as laid down per Hullock, B., in *Attorney-General* v. *Davison*, McCl. & Y. at p. 169.

(*y*) *R.* v. *Amberyate &c. Ry. Co.*, 1 E. & B. 372; and per Ld. Selborne in *R.* v. *Hutchins*, L. R. 6 Q. B. D. 300.

(*z*) Buller's N. P. p. 233.

(*a*) And see, as to records in

a real action against B., and an issue was found against A., this would estop A. and C., in a subsequent action by them against B., from raising the same issue. But it would have been otherwise in an action of trespass (*b*).

A record in an action between A. and B. is no estoppel in an action between A. and C. (*c*), unless, in the former action, issue was joined upon the title to the property in question in the action, and judgment was given thereon (*d*); and unless B. and C. are joint wrong-doers (*dd*). But a judgment in an action against two persons who had borrowed money from the plaintiffs (though the judgment was unsatisfied) was held to constitute a bar to another action brought by the same plaintiffs against a third person, who was afterwards discovered to have been really interested as a partner with the two debtors in the business, for the purposes of which the money had been borrowed (*e*).

But the record in an action between A. and B. would be admissible in evidence in an action between A. and C. (*f*),

which the freehold comes in debate, Bro. Estop. pl. 15; and comments thereon in *Outram* v. *Morewood*, 3 East, 346.

(*b*) *Incledon* v. *Burgess*, Comberbach, Rep. 166; 1 Shower, 27. For a discussion of the differences between judgments in real and personal actions, see *Ferrer's Case*, Co. Rep. vol. iii. p. 271; and per Ld. Ellenborough in *Outram* v. *Morewood*, 3 East, 346.

(*c*) *Kinnersley* v. *Orpe*, 2 Dougl. 517; *Outram* v. *Morewood*, 3 East, 346; *Hudson* v. *Robinson*, 4 M. & S. 475. But see *In re Defries*, *Nordon* v. *Levy*, 48 L. T. 703.

(*d*) *Ferrer's Case*, 2 Cro. Eliz. 668.

(*dd*) In which case there is an estoppel even if the judgment is unsatisfied, *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547.

(*e*) *Kendall* v. *Hamilton*, L. R. 4 App. Cas. 504. But, as to unsatisfied judgments, cf. *Bermondsey (Vestry)* v. *Ramsey*, L. R. 6 C. P. 247.

(*f*) *Blakemore* v. *Glamorganshire Canal Co.*, 2 C. M. & R. 133;

and a record of proceedings between A. and B. may be pleaded as *res judicata* in bar to a second action brought by A. on the same cause of action, against a person having privity with B. (*g*). And where the parties are numerous a judgment against a few selected representatives may bind the rest (*h*).

So also a record in an action in which A. was plaintiff and B. and C. joint defendants is not strictly speaking a legal estoppel in a subsequent action in which A. is plaintiff and B. defendant (*i*), but, if given in evidence, it is conclusive as to the rights of the parties (*j*). However, a judgment in an action against A., B., C., &c., sued as joint debtors, in favour of any one of them, is no bar to a subsequent action against the others in respect of the same claim, if it does not appear that the judgment in the earlier action was obtained on a ground which discharged all the alleged debtors (*k*).

As to the subject-matter of the action.—In order that a record *inter partes* may operate by way of estoppel in a subsequent action, the cause of action must be the same, *i.e.*, there must be a substantial identity (*l*). For instance, a judgment for the plaintiff in an action of replevin was a bar to a subsequent action for special damage to the goods

Parker v. *Lewis*, L. R. 8 Ch. App. 1035.

(*g*) *Strutt* v. *Bovingdon*, 5 Esp. 59; *Lockyer* v. *Ferryman*, L. R. 2 App. Cas. 519.

(*h*) *Commissioners of Sewers &c.* v. *Gellatly*, L. R. 3 Ch. D. 610.

(*i*) *Callow* v. *Jenkinson*, 20 L. J. Ex. 321.

(*j*) See per Ld. Ellenborough in *Strutt* v. *Bovingdon*, 5 Esp. 59; and *Blakemore* v. *Glamorganshire Canal Co.*, 2 C. M. & R. 133.

(*k*) *Phillips* v. *Ward*, 33 L. J. Ex. 7. Cf. *Buckland* v. *Johnson*, 15 C. B. 145.

(*l*) *Plummer* v. *Woodburne*, 4 B. & C. 636.

replevied, as the special damage might have been recovered in the action of replevin. But it was no bar to a subsequent action for trespass to the land on which the goods were (*m*).

So where, in an action at common law, the plaintiff declared on a promissory note and also for goods sold and delivered, but, upon executing a writ of inquiry after judgment by default, he gave no evidence on the count for goods sold and delivered, and took his damages for the amount of the promissory note only, it was held that the judgment was no bar to the plaintiff recovering, in a subsequent action, for the goods sold (*n*).

So, also, the decree of dismissal of a bill in equity was no bar to a new suit in equity, asking the same relief, but stating a different case and giving rise to a different equity. For example, H. filed a bill in equity, in the Supreme Court of Sydney, claiming to be admitted as a shareholder in respect of certain shares, and the Court, after hearing the case on the merits, dismissed the bill. H. subsequently filed a bill in the English Court of Chancery for the same purpose. But, on the ground that the allegations in the former suit were different from those in the latter, the decision at Sydney was held not to be conclusive against the plaintiff in the latter suit (*o*).

(*m*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454.

(*n*) *Seddon* v. *Tutop*, 6 T. R. 607. The judgment in the former action was, however, held to be *primâ facie*, though not conclusive, evidence that the demand had been inquired into: see the judgment of Grose, J., and cf. *Hadley* v. *Green*, 2 C. & J. 374; and *Davis* v. *Hedges*, L. R. 6 Q. B. 687.

(*o*) See per Ld. Westbury in *Hunter* v. *Stewart*, 31 L. J. Ch. N. S. 346, reversing Wood, V.-C. And as to the refusal of a former motion, see *In re Anglo-French, &c. Soc.*, L. R. 14 Ch. D. 533.

Moreover, the mere allegation, in a bill for relief in Chancery, of matters which were not and could not be the subject of a decree in the suit, was no bar to a new suit founded upon such matters, subsequent to the decree (*p*).

And, in the same way, a judgment *in personam* in an Admiralty case is no bar to a subsequent action *in rem* (*q*).

But the mere fact that the form of action was not the same, did not under the old system prevent a judgment in one action operating as a bar to another (*r*). Thus a judgment in trover might operate as a bar to an action for money had and received (*s*); and, if the declaration were framed in such a manner that the causes of action might be the same, it was incumbent on the party bringing the action to show that they were not (*t*).

And where the demand for which the second action was brought existed prior to the first action, it would seem that it is incumbent on the plaintiff in the second action to show that such demand was not inquired into in the first action (*u*).

(*p*) *Bainbridge* v. *Baddeley*, 2 Phil. 705; *Toulmin* v. *Copland*, 2 Phil. 711.

(*q*) *Nelson* v. *Couch*, 15 C. B. N. S. 99; *The Bengal*, Swabey's Adm. 468; *The John & Mary*, Swabey's Adm. 471; *The Sylph*, L. R. 2 Adm. 24.

(*r*) *Clere* v. *Powell*, 1 Moo. & Rob. 228; *Slade's Case*, Co. Rep. vol. ii. p 501.

(*s*) *Buckland* v. *Johnson*, 23 L. J. C. P. 204; *Few* v. *Backhouse*, 8 A. & E. 789; *Palmer* v. *Temple*, 9 A. & E. 508; *Bristowe* v. *Fairclough*, 1 M. & G. 142.

(*t*) See the judgment of Abbott, C. J., in *Ld. Bagot* v. *Williams*, 3 B. & C. 235.

(*u*) See, in the case of a reference to arbitration, *Ravee* v. *Farmer*, 1 T. R. 146; and *Golightly* v. *Jellicoe*, note *ibid.* See also *Smith* v. *Johnson*, 15 East, 213; and *Dunn* v. *Murray*, 9 B. & C. 780.

And where the cause of action is the same, and the plaintiff has had an opportunity in the former action of recovering, and but for his own fault might have recovered that which he seeks to recover in the second one, the former judgment is a bar to the second action, even though the claim in the second action is for a very much larger amount (*x*).

Thus where plaintiff sued in an action of assumpsit for money had and received, and defendant pleaded a judgment recovered by default, for £1000, in an inferior court for the same causes of action, and plaintiff replied that the causes of action were not the same ; and at the trial it appeared that defendant had received on account, from plaintiff, and as his steward, sums of money at different times ; and that, on the investigation of the accounts, plaintiff found that there was due to him a much larger sum than that for which he had declared in the inferior court ; but that he had proceeded for the smaller sum under the belief that defendant had no available property beyond that amount, it was held, that all the sums which plaintiff knew that defendant had received at the time when he commenced the action in the inferior court, were to be considered as causes of action in respect of which he had declared and recovered judgment (*y*).

And again, where plaintiff brought an action in the county court for damage to his cab through defendant's negligence, and having recovered the amount claimed

(*x*) See the remarks of Willes, J., in *Nelson* v. *Couch*, 15 C. B. N. S. 99, at p. 108 ; and *Barber* v. *Lamb*, 8 C. B. N. S. 95 ; see also *The Phosphate Sewage Co.* v. *Molleson*, L. R. 4 App. Cas. 801.

(*y*) *Ld. Bagot* v. *Williams*, 3 B. & C. 235.

(£4 3*s.* 0*d.*), brought an action in the Divisional Court against defendant, claiming damages for personal injury sustained by plaintiff through the same negligence, and the jury found for the plaintiff with £350 damages, it was held that, inasmuch as the damages for personal injuries might have been claimed in the first action, the judgment recovered in it was a bar to subsequent proceedings (*z*).

However, facts "noviter peracta et ad notitiam perventa," may be introduced in a subsequent action, even where matter which might have been known by reasonable diligence on the former occasion could not be so introduced (*a*).

And the distinction should be borne in mind between a continuing cause of action and fresh damages arising out of the same cause of action. Thus, in an action on the case for erecting a nuisance, defendant pleaded a prior action for erecting the same nuisance and a recovery thereon, and plaintiff demurred, but judgment was given for defendant, for plaintiff might have had an action for a continuance of the same nuisance, but not a new action for the same nuisance (*b*). On the same principle new consequential damages do not give a fresh right of action for assault, after a former recovery had (*c*).

The general principle upon which the plea of *res judicata* depends, and also the rule by which it may be determined whether the cause of action is the same or

(*z*) *Brunsden* v. *Humphrey*, L. R. 11 Q. B. D. 712.

(*a*) See per Willes, J., in *Stevens* v. *Tillett*, L. R. 6 C. P. 147.

(*b*) *Johnson* v. *Lomy*, 1 Salk. 10; *Clarke* v. *Yorke*, 52 L. J. Ch. 32.

(*c*) *Fetter* v *Beale*, 1 Salk. 11. But a summary order is no bar as to fresh causes of complaint; *Cutler* v. *Turner*, L. R. 9 Q. B. 502.

not, has been well stated, as follows :—"You shall not bring the same cause of action twice to a final determination. 'Nemo debet bis vexari'; upon this we found our judgment; and what is meant by the same cause of action is where the same evidence will support both the actions (*d*), although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action, and it runs through all the cases in the books, both in real and personal actions. It was resolved in *Ferrer's Case* (*e*) that when one is barred in any action, real or personal, by judgment upon demurrer, confession, verdict, &c., he is barred as to that or the like action, of the like nature, for the same thing for ever; for 'expedit reipublicæ ut sit finis litium'"(*f*).

Thus, where a suit for declarator of marriage was brought against a lady in Scotland, and after trial was dismissed, and it appeared that the pursuer had at the time of the hearing all the facts within his knowledge, and had the power to raise them, it was held that he was barred from instituting, upwards of thirty years afterwards, a second suit for declarator of the marriage against the lady's trustees, after her death, although it was urged in the second suit, that the decree in the former suit had been obtained through fraud and by false

(*d*) See also Ld. Westbury's judgment in *Hunter* v. *Stewart*, 31 L. J. Ch. N. S. 346, and V.-C. Wood's remarks thereon in *Simpson* v. *Fogo*, 29 L. J. Ch. 657; 32 L. J. Ch. 249.

(*e*) 2 Cro. Eliz. 668.

(*f*) *Hitchin* v. *Campbell*, 2 Sir W. Bl. 827.

evidence (*g*). "The object of the rule of *res judicata*," said Lord Blackburn, "is always put upon two grounds; the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other the hardship on the individual that he should be vexed twice for the same cause." Again, Lord Penzance, in his judgment in another case, says, "When that which was originally only a right of action has been advanced into a judgment of a court of record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Baron Parke in *King* v. *Hoare* (*h*). He says: 'The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. Hence the legal maxim, "Transit in rem judicatam"; the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher'" (*i*).

The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time (*k*).

(*g*) *Lockyer* v. *Ferryman*, L. R. 2 App. Cas. 519.

(*h*) 13 M. & W. 494, at p. 504.

(*i*) *Kendall* v. *Hamilton*, L. R. 4 App. Cas. 504, at p. 526; *Nelson* v. *Couch*, 15 C. B. N. S. 99; and per Eyre, C. J., in *Philips* v. *Hunter*, 2 H. Bl. 414.

(*k*) Per Lord Kenyon, C. J., in *Greathead* v. *Bromley*, 7 T. R.

The elements which, in a civil case, are, generally speaking, necessary to establish the plea of *res judicata*, are thus explained in the judgment of Lord O'Hagan in a recent case (*l*). First, every opportunity must have been given to all the parties to make their respective cases. Secondly, a tribunal perfectly competent to decide the issues raised between the parties. Thirdly, distinct issues, or a distinct issue, raised between the parties, before the said tribunal. Fourthly, a valid and final adjudication upon the said issues, or issue, so raised. Fifthly, a deliberate acting upon the said adjudication, as between all the parties interested. And therefore the English Courts are reluctant to interfere with the decision of a competent Court which had, or might have had, but for the fault of one of the parties to the cause, all the materials before it to come to a right conclusion. This is illustrated by the following case (*m*). For the purpose of having a contract of sale of a concession set aside on the ground of fraud and repayment of the purchase money,

455; and per Wigram, V.-C., in *Henderson* v. *Henderson*, 3 Hare, 115; cited with approval by Wood, V.-C., in *Simpson* v. *Fogo*, 29 L. J. Ch. 657; 32 L. J. Ch. 249. See also *In re May*, L. R. 25 Ch. D. 231. As to the jurisdiction of a judge to re-hear an order under the Judicature Act, 1873, see *In re St. Nazaire Co.*, L. R. 12 Ch. D. 88. But as to matters which might have been pleaded by way of set-off or counter-claim in the first action, see *Hindley* v. *Haslem*, L. R. 3 Q. B. D. 481.

(*l*) *Dundas* v. *Waddell*, L. R. 5 App. Cas. 249, at p. 269; see also per Willes, J., in *Langmead* v. *Maple*, 18 C. B. N. S. 255, 270; and *National Bolivian &c. Co.* v. *Wilson*, L. R. 5 App. Cas. 176.

(*m*) *Phosphate Sewage Co.*, (*Lim.*) v. *Molleson*, L. R. 4 App. Cas. 801.

a company filed a bill in the English Court of Chancery. At the same time they lodged a claim in Scotland to be ranked as creditors for the amount of the said purchase-money, upon the estates of a firm carrying on business in Edinburgh and London, which had been sequestrated in Scotland. In the claim, the company described the debt as owing under the circumstances set out at length in the bill in chancery, "produced and held as repeated *brevitatis causâ*." The trustee having rejected the claim, a condescendence and proof was ordered in Scotland. The proof was then adduced. The Court of Session and ultimately the House of Lords, held that the claimants were not entitled to the debt claimed against the sequestrated estates; and refused to sist the proceedings in the sequestration, pending the issue of the chancery suit (*n*). The bill in chancery, to which the trustee was a party, as filed alleged certain indicia of fraud: afterwards additional evidence of fraud was discovered, in time to have it inserted, by way of amendment, in the bill, and before the proof above alluded to had been adduced (*o*). The bill was then amended, and a decree was made by the Vice-Chancellor (affirmed by the Court of Appeal), rescinding the contract and ordering repayment of the said purchase-money; and a declaration was added that the plaintiff company should be at liberty to prove in the sequestration suit in Scotland for the amount of the said purchase-money (*p*). The company then lodged another claim with the trustee in Scotland.

(*n*) L. R. 1 App. Cas. 780.

(*o*) But this additional evidence was not made use of in the proceedings on the proof.

(*p*) L. R. 5 Ch. D. 394.

Again he rejected the claim, and again a condescendence was made up. The company this time put their claim upon the allegations contained in the amended bill. The trustee relied on the plea of *res judicata*. Held that the plea of *res judicata* prevailed because (1), the new allegations of fraud in the amended bill did not constitute a new medium *concludendi*, and (2), because the alleged facts were within the knowledge of the claimants before the proof was adduced in the former action, and might have been inserted, by way of amendment, in their closed record in Scotland. Lord Cairns in his judgment says (*q*): "As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to reopen that litigation merely by saying that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been ascertained by me before" (*r*).

(*q*) L. R. 4 App. Cas. at p. 814.

(*r*) See also the judgments in the courts below. Court Sessions Cases, 4th series, vol. v., p. 1125.

The question how far a judgment is conclusive as regards matters incidentally determined by it or collateral to it, arose in the case of *Barrs* v. *Jackson* (*s*), where Knight-Bruce, V.-C., in a learned and exhaustive judgment, in which he cited at length several important passages from the civilians, decided that such matters can be investigated afresh in a suit brought for any other purposes.

The Vice-Chancellor, in his judgment in the above case, lays down the following important restriction upon the general rule against reagitating matters which have been once adjudicated upon. He says: "It is, I think, to be collected, that the rule against reagitating matter adjudicated is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object" (*t*).

(*s*) 1 Y. & C. C. C. 585. Although the judgment of Knight-Bruce, V.-C., was reversed on appeal, on the authority of *Bouchier* v. *Taylor*, 4 Bro. P. C. 708, the main principles laid down by him were left untouched, and have ever since been recognized and acted upon. See also Lord Westbury's judgment in *Hunter* v. *Stewart*, 31 L. J. N. S. Ch. 346.

(*t*) See also *Hobbs* v. *Henning*, 17 C. B. N. S. 826; and Lord Selborne's judgment in *R.* v.

Thus a judgment in Divorce is not evidence of matter to be inferred from the judgment. For instance, in an action for necessaries supplied to defendant's wife, (who was living apart from him), the separation was alleged to be on account of the cruelty and desertion of her husband (defendant). Defendant produced in evidence a sentence of the Consistorial Court of the Diocese of Cork and Ross, dismissing a suit of separation, from bed and board, instituted by the wife against him on the ground of cruelty and for alimony. This was held to be evidence but not conclusive evidence on the point whether the wife's separation was caused by the husband's misconduct or not, and as to the amount of damages, if any, to be given. But it would seem that it was not evidence at all on the point whether the wife was entitled to alimony or not, as the decree merely decided that she was not entitled to a divorce for cruelty, and the question of alimony would be a mere matter of inference from the decree (*u*). But a decree, in a husband's suit for dissolution of marriage, dismissing his petition on the ground of his adultery, has been held to be conclusive evidence against him, in a subsequent suit by him for dissolution

Hutchins, L. R. 6 Q. B. D. 300; see also the judgment of Brett, L. J., in *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. 295, at p. 307, who says, "I think it true to say that the judgment of Knight-Bruce, V.-C., in *Barrs* v. *Jackson*, does show that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties, either to maintain or to defend other issues therein raised."

(*u*) *Day* v. *Spread*, 1 Jebb & Bourke's Rep. 163; and Appendix B, p. 421.

of marriage, although brought against other co-respondents (*v*).

The following distinction was also laid down in the opinions of the judges in the *Duchess of Kingston's Case* (*x*), between the judgments of courts having concurrent and of those having exclusive jurisdiction, over matters in dispute. "From the cases as to judgments being given in evidence in civil suits, two deductions seem to follow as generally true. First, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court. Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred (*xx*) by argument from the judgment."

The following comments are made upon this in Phillipps on Evidence (*y*). "It is only upon a matter directly in question that the judgment of a court of concurrent jurisdiction is conclusive: while the judg-

(*v*) *Conradi* v. *Conradi*, L. R. 1 P. & D. 514.

(*x*) 20 St. Trials, pp. 355—651; 2 Smith's L. C. (8th edit.), p. 781 *et seq.*; and 1 Leach C. C. 146.

(*xx*) As to the conclusiveness of judgments with respect to the grounds of the decision, see Bank of Hindustan &c., *In re Alison's Case*, L. R. 9 Ch. App. 1.

(*y*) See Phill. Ev., vol. ii. p. 5.

ment of a court of exclusive jurisdiction is conclusive, not only when the matter comes in question directly, but also when it comes incidentally in question. This difference in the effect of the judgments arises from the difference in the constitution of the courts which pronounce them. When a matter, over which some other court is allowed to have exclusive jurisdiction, comes in question, whether directly or incidentally, and the judgment of such a court is offered in evidence as proof of the matter, it must necessarily be conclusive. Implicit credit must be given to a court so constituted, while its judgment is unreserved and in full force. For the court in which the particular matter is to be proved, has no authority to examine into the merits of the judgment, and must take the matter as judicially and conclusively decided."

Fraud forms another exception to the rule as to the conclusiveness of judgments. Thus it is laid down in the *Duchess of Kingston's Case* (*z*) that fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. "I think," said Turner, L.J., in another case (*a*), "that the proceedings of a court of justice may be vitiated and rendered void by fraud and collusion in the same manner and to the same extent, as the most solemn acts and deeds of the parties may be vitiated and rendered void on that ground." Thus in the Ecclesiastical Courts collusion would overturn any sentence that had been pronounced (*b*). "The common law," said the judges in

(*z*) Appendix B, p. 428; and see *Shedden* v. *Patrick and others*, 1 Macq. 535.

(*a*) *Harrison* v. *Mayor, &c., of Southampton*, 22 L. J. Ch. 722.

(*b*) *Meddowcroft* v. *Huguenin*, 4

the *Duchess of Kingston's Case* (*c*), "so abhors fraud and covin that all acts, as well judicial as others, though of themselves just and lawful, yet being mixed with fraud and deceit, are in judgment of law tortious and unlawful" (*d*). Thus a collusive fine levied with proclamations by a tenant for years or by copy of court roll, in order to deprive the lord of his inheritance was absolutely void, and the lord's right was absolutely unbarred, notwithstanding the expiration of the five years (*e*). For those who recovered land by covin were held to be in as disseisors or trespassers, according to the nature of the actions in which they recovered (*f*). Thus also a judgment in one court might be adjudged to be void in another court, on account of collusion (*g*), except perhaps in the case of adjudications made final to all intents and purposes, by the special Act of Parliament by which the jurisdiction is created (*h*).

But it seems doubtful whether parties would be

Moo. P. C. C. 386; *Perry* v. *Meddowcroft*, 10 Beav. 122; and see *Roach* v. *Garvan*, 1 Ves. senr. 157.

(*c*) 20 St. Trials, p. 355.

(*d*) *Fermor's Case*, Co. Rep. vol. ii. 202.

(*e*) *Ibid.*

(*f*) *Ibid.*; *Wimbish* v. *Tailbois*, Plowden's Rep. 44: Bro. Ab. & Fitz. Ab., Tit. Collusion. So also even the sale of goods in market overt is not good against the true owner, if there is covin. Bro. Ab., Tit. Collusion, 4; and *Wikes* v. *Morefoots*, 1 Cro. Eliz. 86. It seems, however, that it can be avoided only by a person who had acquired title prior to the sale. *Twyne's Case*, Smith's L. C. (8th ed.) vol. i. p. 1.

(*g*) *Barber* v. *Pullen*, referred to in Hargrave's Tracts, p. 481; *Farr's Case*, Siderfin, 254. So a judgment originally good, may become covinous by a subsequent act. See *Turnor's Case*, Co. Rep. vol. iv. 403.

(*h*) *Waygood* v. *James*, L. R. 4 C. P. 361.

admitted to prove collusion in another court (*i*) although it might certainly be done in the case of strangers (*k*), as they could not get the judgment reversed. Thus, it was held (*l*), that a sentence of the ecclesiastical court to which the defendant was a party, could not be avoided by him in a subsequent action in the temporal courts on the ground of fraud; as the proper course for the defendant (being a party) to have taken, was to have applied to the ecclesiastical court to vacate the sentence (*m*). So also in another case (*n*), where fraud had been practised in the consistory court of the Bishop of London, and was discovered in the prerogative court on appeal, the judge of the latter court said, "You must go into the consistory court, where the fraud was practised. I can give you no relief" (*o*).

And where money has been levied by a regular execution, under a judgment valid on the face of it, it cannot

(*i*) See the opinion of the judges in *The Duchess of Kingston's Case*, Appendix B, p. 428; *Bransby* v. *Kerridge*, 1 P. Wms. 548. But see now the Judicature Acts and the Bankruptcy Acts, 1883, by which the superior courts are constituted Divisions of the High Court.

(*k*) *Farr's Case*, Siderfin, 254; Appendix B, p. 419. See also the cases collected in Hargrave's Tracts, pp. 479 — 486; see *contra*, *Hatfield* v. *Hatfield* (cited by Wallace), Appendix B, p. 413; and for a recent case, see *Girdlestone* v. *Brighton Aquarium Co.*, L. R. 4 Ex. D. 107.

(*l*) *Prudham* v. *Phillips*, 2 Amb. 762.

(*m*) There appears, however, to have been another ground for the decision in *Prudham* v. *Phillips*, namely, that Mrs. Phillips, who offered the collusive sentence in evidence, was herself one of the colluding parties: see a note on the above case in *Doe* d. *Davy* v. *Haddon*, 3 Dougl. 310.

(*n*) *Lady Mayo's Case*, Appendix B, p. 420.

(*o*) The effect of fraud on ecclesiastical sentences is further discussed in Appendix A, pp. 407–8.

be recovered back in an action for money had and received, on the ground that judgment was signed, or execution issued, fraudulently; the proper remedy, in such a case, being to have the judgment or execution set aside on the ground of fraud (*p*).

Fraud in one court can only be examined in another court having a concurrent jurisdiction (*q*), and the defence of fraud cannot be set up by a person who was himself a party to the fraud (*r*). Thus a fraudulent and collusive act of the defendant cannot be set up by him as a defence to a criminal prosecution (*s*).

But mere lapse of time will not prevent the Court examining into a question of fraud. Thus where, on a question of legitimacy in the Court of Chancery, there was evidence of a sentence of nullity of marriage of a minor for want of her father's consent, and there was also evidence that the sentence had been obtained by fraud and collusion between the husband and wife and that the father had been aware of and did not disapprove of the match, it was held, fifty years after the date of the sentence of nullity, that the marriage should be presumed valid (*t*).

But it appears that a decree of divorce would not be set aside merely on the ground of fraud or collusion, after the deaths of all the parties to the proceeding (*u*).

(*p*) *De Medina* v. *Grove*, 10 Q. B. 170.

(*q*) Per L. C. Apsley, in *Meadows* v. *Duchess of Kingston*, 2 Amb. 756.

(*r*) *Prudham* v. *Phillips*, 2 Amb. 762.

(*s*) See a case cited by the Solicitor-General in *The Duchess of Kingston's Case*, App. B, p. 419.

(*t*) *Harrison* v. *Mayor, &c., of Southampton*, 22 L. J. Ch. 722.

(*u*) Per Ld. Westbury in *Shaw* v. *Gould*, L. R. 3 H. L. at p. 88.

Finally, when fraud is set up in answer to a judgment, the allegations of fraud and collusion must be specific. And it is not enough to show that somebody has been guilty of fraud in the conduct of the case; but the fraud must have been on the part of one of the parties to the action in which the judgment was obtained (*x*); and it must appear that the proceedings themselves were actually concocted and conducted in fraud (*y*).

The effect of fraud upon foreign judgments will be discussed in a future chapter. The principles, however, which are applicable to the defence of fraud, are the same both in the case of domestic and foreign judgments (*z*).

(*x*) *Flower* v. *Lloyd*, L. R. 10 Ch. D. 327, as explained in *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. (C. A.) 295, at p. 308.

(*y*) *Shedden* v. *Patrick*, 1 Macq. 535; *Cammell* v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728. By Order XIX., rule 15 of R. S. C. 1883, fraud as a defence must be specially pleaded. For a precedent of such a plea, see *Girdlestone* v. *Brighton Aquarium Co.*, L. R. 2 Ex. D. 137.

(*z*) *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. 295, at p. 305.

CHAPTER IV.

DOMESTIC JUDGMENTS IN REM.

A JUDGMENT *in rem* has been defined as follows: "A judgment *in rem*, I conceive to be an adjudication pronounced, (as indeed its name denotes), upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose" (*a*).

"The term 'judgment *in rem*,'" says Phillipps in his work on Evidence (*b*), "is probably derived from the civil law, where actions were classed as *actiones in personam* and *actiones in rem*; the former including actions upon contract or for injuries, (ex contractu vel ex maleficio), the latter referring to actions in which some particular thing was the subject-matter of controversy, (cum movet alicui de aliquâ re controversiam). Under the Roman law, therefore, a judgment *in rem*, generally, was 'ut rem ipsam restituat (possessor) cum fructibus.'"

As previously pointed out, judgments *in personam*, or *inter partes*, bind only parties and privies and not strangers, but judgments *in rem* are binding upon all the world. A judgment *in rem*, being a most solemn

(*a*) Sm. L. C. (8th ed.) vol. ii. p. 809.

(*b*) Vol. ii. p. 6, note 1.

declaration from the proper and accredited quarter, that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon, was not such as declared by the adjudication (*c*).

In the present chapter, which deals only with domestic and not with foreign judgments, we shall discuss judgments *in rem* under the following heads (*d*) :—

1. Judgments of condemnation of property forfeited; (*α*) by the Court of Exchequer, and (*β*) by the commissioners, or sub-commissioners, of excise, inland revenue, or customs.

2. Adjudications in the Court of Admiralty on the subject of prize.

3. Judgments in the Divorce Court.

4. Grants of probate and administration.

5. Adjudications in bankruptcy.

6. Sentences of deprivation and expulsion, whether delivered by the Spiritual Court, a Visitor, or a College.

7. Judgments of outlawry and declarations of legitimacy.

8. Adjudications of settlement by an order of justices, whether unappealed against, or confirmed by a Court of Quarter Sessions on appeal (*e*).

(*c*) Smith's L. C. (8th ed.), vol. ii. p. 809; *R.* v. *Hartington*, 4 E. & B. 780; *Cammell* v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728; *Simpson* v. *Fogo*, 29 L. J. Ch. 657; 32 L. J. Ch. 249; *Castrique* v. *Imrie*, 8 C. B. N. S. 405; L. R. 4 H. L. 414; *R.* v. *Hutchins*, L. R. 5 Q. B. D. 353, L. R. 6 Q. B. D. 300; Story's Conflict of Laws (7th ed.), § 592.

(*d*) These headings are taken partly from the arrangement in Pitt-Taylor on Evidence (7th. ed.), pp. 1401, 1402.

(*e*) Besides the above, it appears

We shall also notice certain other adjudications about which there seems to be some doubt as to whether they operate as judgments *in rem* or judgments *in personam*.

These will consist of:—

9. Judgments and orders made under special statutory powers, (α) by courts of summary jurisdiction (β) generally.

10. Sentences of courts martial.

11. Judgments of proceedings by way of *quo warranto*.

12. Convictions in criminal prosecutions; and inquisitions.

1. (α.) *Judgments of condemnation of property forfeited by the old Court of Exchequer.*—This court (f) had, in certain revenue cases, the right to condemn goods, and a judgment of condemnation operated as a judgment *in rem* and was conclusive against all the world, that the goods so condemned were liable to seizure (g). One ground why such judgments were regarded as judgments *in rem*, appears to have been that they occasioned a forfeiture of goods, and another because of their notoriety (h). This has been laid down by a learned judge as follows (i):

that judgments for the Crown in actions of *scire facias* for the repeal of patents formerly operated as judgments *in rem*. Johnson's Patentees' Manual (1879), pp. 271, 272. But these have now fallen into disuse.

(f) Now merged in the Queen's Bench Division of the High Court of Justice.

(g) *Geyer* v. *Aguilar*, 7 T. R. 696; Buller's N. P. 244; *Scott* v. *Shearman*, 2 Sir W. Bl. 977; *Roberts* v. *Fortune*, Hargrave's Tracts, p. 468; *Henshaw* v. *Pleasance*, 2 Sir W. Bl. 1174; *Papillon* v. *Buckner*, Hardres' Rep. 478; *Terry* v. *Huntingdon*, Hardres's Rep. 480.

(h) *Scott* v. *Shearman*, 2 Sir W. Bl. 977.

(i) See the reasons of Mr. Jus-

"Because the property of the goods being changed, and irrevocably vested in the crown by the judgment of condemnation, it follows, as a necessary consequence, that neither trespass nor trover can be maintained for taking them in an orderly manner. For the condemnation has retrospect and relation backwards to the time of seizure. . . . This reasoning is supported by authorities expressly in point. In Gilbert's Treatise of the Exchequer, Cap. 13, it is clearly shown in what manner these informations in rem, which were instituted in order to give the crown possession of its ancient revenues of wrecks, deodands, estrays, and the like, by degrees came afterwards to be applied to the forfeitures enacted by the statute law, for offences against the laws of the customs and excise. And it is expressly laid down (p. 181), that the very seizing of the goods is notice to the claimer, and an undertaking to proceed to condemnation, according to the rules of the court. The retrospect or relation backwards in these informations was the same as in the inquests of office (*k*). . . . The case also of fugitives' goods is a strong instance to show how conclusive the law esteems the judgment of forfeiture to be, when pronounced by a legal and competent tribunal. If the coroner's inquest finds a man guilty of homicide, and that he fled for it: though he may traverse the crime, and be acquitted of the felony, yet he cannot traverse the flight, by which his goods are forfeited to the king (*l*). And

tice Blackstone in *Scott* v. *Shearman*, *ibid.*

(*k*) See Keilwey's *Relationes quorundam casuum*, p. 68 b, Tit. Deodand, giving an instance of a retrospect in the case of a deodand.

(*l*) 8th ed. 4. 4; 1 Hale's P. C. 416; 2 Hale's P. C. 64.

therefore, though the petty jury expressly acquit him of both the felony and the flight, their verdict as to the flight shall be void: for they ought not to inquire of the flight, after it has been once found, and the forfeiture vested in the crown by the coroner's inquest (*m*). The reason given in some of the books why this inquest is not traversable, like other inquests of office, is because of the notoriety of the coroner's inquest super visum corporis, at which the inhabitants of all the neighbouring vills are bound to attend: and so the finding of the flight is but in effect recording the absence of the party. There is surely as much notoriety of the information in the exchequer against uncustomed goods: and the absence or default of the party shall be equally conclusive against him."

But though a judgment of condemnation by the Court of Exchequer operated as a judgment *in rem*, a conviction by the same court and concerning the same transaction, of the person committing the illegality was not even evidence in subsequent civil proceedings.

Thus in *Hart* v. *McNamara* (*n*), which was an action for the price of rum sold by plaintiff, and in which the defence was that the rum was adulterated: to prove the adulteration, a record of condemnation of the rum was offered in evidence: and, to connect plaintiffs with the cause of condemnation, a record was offered in evidence, of proceedings taken by the crown against defendant for penalties, in which defendant had been convicted; and it

(*m*) Fitz. Ab. Forfeiture 35; Staundf. P. C. 183, and Prerog. 46; Dyer, 238 b; 2 Hale's P. C. 301.

(*n*) Cited in *R.* v. *Horton*, 4 Price, 154.

was held by Gibbs, C. J., that the record of condemnation was admissible, being *in rem*, but he refused to admit of the record of conviction for penalties, stating that as it was *in personam*, it was not evidence in any case where the parties were different.

It seems doubtful, whether or not an acquittal of goods in the old Court of Exchequer was conclusive evidence in a subsequent action for the goods. The point does not seem to have been fairly raised in *Cooke* v. *Sholl* (*o*), although it is adverted to by several writers (*p*) and will be noticed hereafter in dealing with criminal verdicts.

(*β.*) *Judgments of condemnation of property forfeited, by the commissioners or sub-commissioners of excise, inland revenue, or customs.*—Formerly these operated as judgments *in rem*. Thus in an action of trover for tea against an excise officer (*q*), it appeared that plaintiff sent the tea for one L., with a permit: but that the porter on his way called at the house of one R., where, having set down his burthen, defendant seized it as forfeited, and as having been brought to R.'s house, for R.'s use, without a permit (*r*). Defendant, in the action of trover, pleaded not guilty, and, to show that the property in the tea was not in plaintiff, he produced a condemnation of the tea by the Commissioners of Excise, upon an information against R. for receiving the tea without a permit. Lee, C. J.,

(*o*) 5 T. R. 255.

(*p*) Vin. Ab. Evidence, p. 94, heading, "Condemnation of goods seized"; Story's Conflict of Laws (7th ed.), p. 738; Buller's N. P. 245 a, note a; and 1 Phillipps' Evidence, p. 338.

(*q*) *Roberts* v. *Fortune*, Hargrave's Tracts, p. 468 note.

(*r*) The seizure was under a special statute, namely, 10 G. I. chap. 10, sec. 16.

said, "The judgment of forfeiture is a judgment on the thing itself. How the tea came to R.'s house was a matter proper for the consideration of the commissioners: and if the plaintiff was willing to have defended the suit, she might have come in *pro interesse suo* (*s*), which not doing, her property is bound: and there is no more in this than the common case, namely, that courts of law pay such deference to the judgments of each other in matters within their jurisdiction, that the first determination by a proper authority ought to prevail." Plaintiff was accordingly nonsuited.

However, in a later case (*t*) it was decided by three judges that a condemnation of goods by the Commissioners of Excise, under the general excise laws, was not conclusive evidence at common law, even in an action of trespass against the officers of excise for seizing the goods. "It was determined," said they, "very lately in *Scott* v. *Shearman* (*u*) in this court, and has been uniformly so held for above a century, that a condemnation of goods in the Exchequer is conclusive evidence against all the world. But the reasons and authorities relied on in that and all the other cases, extend only to that court, being the king's supreme court of revenue, and not to the inferior jurisdictions of the Boards of Excise and Customs" (*x*).

(*s*) See as to this doctrine the judgment of Lord Eldon in *Lothian* v. *Henderson*, 3 B. & P. 517, and post, pp. 184, 185.

(*t*) *Henshaw* v. *Pleasance*, 2 Sir W. Bl. 1174. See also the remarks on this and the preceding case in Hargrave's Tracts, p. 468 note.

(*u*) 2 Sir W. Bl. 977.

(*x*) See further, as to the Commissioners of Excise having only a limited jurisdiction. *Papillon* v. *Buckner*, Hardres's Rep. 478;

It appears therefore very doubtful whether such judgments have ever operated as judgments *in rem*. But it seems that in certain cases where the commissioners acted under the authority of special statutes (regulating the customs, or excise duties, on particular articles), such judgments were conclusive, at any rate in subsequent actions of trespass against them or their officers. Thus where A. was convicted by the Commissioners of Excise, of an offence under a statute relating to the revenue (*y*), viz., of setting up a distillery without first giving notice to the officers of excise, and the statutory penalty was imposed on him, and a warrant of distress issued for its recovery, it was held, in an action of trespass brought by A. against the commissioners, and their under-officers, for taking the money under the warrant, that the conviction by the commissioners was conclusive, and that the truth of the facts on which they had grounded their judgment could not be inquired into (*z*).

2. *Adjudications in the Court of Admiralty on the subject of prize* (*a*).—A judgment of a Court of Admiralty, condemning a vessel as prize, and ordering it to be sold,

Terry v. *Huntingdon*, Hardres's Rep. 480. But Hale, C. B., in the latter case said (see at p. 483), that though their jurisdiction was limited, yet, if they committed a mistake in a thing that was within their power, it would not be examinable elsewhere.

(*y*) 3 W. & M. Cap. XV.

(*z*) *Fuller* v. *Fotch*, Carth. 346.

(*a*) The jurisdiction of the Court of Admiralty is now transferred to the Probate and Admiralty Division of the High Court of Justice. A prohibition lay to the Court of Admiralty, although it possessed by statute some of the powers of a superior Court. *James* v. *L. & S. W. Ry. Co.*, L. R. 7 Ex. 187, 287.

is a judgment *in rem*, and conclusive against all the world (*b*). And so is the judgment of a Court of Admiralty on a claim of salvage, or in an action on a bottomry bond, or in cases of maritime lien. For the purposes of these suits and the effect of the judgments in them are to afford a remedy, not by execution against the person or the general estate of the defendants, but by the appropriation of a specific chattel to satisfy the plaintiff's claim (*c*).

But a judgment *in rem* in Admiralty against a vessel, in a case of collision, is not a bar to a subsequent action for damages against the owner, if the proceeds of the sale of the vessel are less than the damage sustained by the collision (*d*). Nor is a judgment for damages against the owner a bar to a subsequent action *in rem* against the vessel, if the damages recovered against the owner are less than the damage sustained by the collision (*e*).

3. *Judgments in the Divorce Court* (*f*).—A sentence in a matrimonial suit has always been held to be binding as a judgment *in rem* (*ff*), being an adjudication upon the

(*b*) *Le Caux* v. *Eden*, 2 Dougl. 611, and notes.

(*c*) In *Imrie* v. *Castrique*, 8 C. B. N. S., at pp. 411, 412, Cockburn, C. J., says, "If a creditor has a right in a thing otherwise the property of his debtor, whereby he is entitled to follow it into whosesoever hands it may pass, and to have it seized and sold to satisfy his claim, it seems to me impossible to doubt that a proceeding to enforce such a right is a proceeding *in rem*."

(*d*) *Nelson* v. *Couch*, 15 C. B. N. S. 99; and see *ante*, p. 59.

(*e*) *The Bengal*, Swabey's Adm. Rep. 468; *The John and Mary*, Swabey's Adm. Rep. 471; *The Sylph*, L. R. 2 Adm. 24.

(*f*) See now the Judicature Act 1873, s. 31.

(*ff*) But the decree, if for a divorce, must be absolute; *Norman* v. *Villars*, L. R. 2 Ex. D. 359.

status of the parties (*g*); and this extends to a decree of nullity of marriage (*h*).

Thus a decree of the Spiritual Court declaring a marriage void *ab initio* has been held to be conclusive as to the status of one of the issue, a pauper, although an order for removal of others of the issue had been made, and confirmed on appeal, on the ground of the validity of the marriage (*i*).

But sentences which do not affect the status of the parties do not operate as judgments *in rem*. For instance, the dismissal of the wife's petition for judicial separation, on the ground that the acts of adultery alleged against the husband had not been proved, although it was held to estop the wife from raising the same issue as a defence to the husband's suit for restitution of conjugal rights (*ii*), was held to be conclusive merely between the same parties, upon the same matter (*j*). In like manner a sentence in a suit for jactitation of marriage, which does not affect the status of the parties, but which is instituted merely to prevent one party falsely asserting that a marriage took place under certain circumstances does not operate as a judgment *in rem* (*k*). And therefore a sentence *contra matrimonium* in a suit for jactitation of marriage, was

(*g*) *Da Costa* v. *Villa Real*, 2 Str. 961; and Appendix B, p. 414. See also *Bunting* v. *Lepingwell*, Co. Rep., vol. ii., p. 355; *Kenn's Case*, Co. Rep., vol. iv., p. 136; *Meddowcroft* v. *Huguenin*, 4 Moo. P. C. 386; *Perry* v. *Meddowcroft*, 10 Beav. 122.

(*h*) Per James, L. J., in *Niboyet* v. *Niboyet*, L. R. 4 P. D. at p. 9.

(*i*) *R.* v. *Wye*, 7 A. & E. 761.

(*ii*) And cf. *Finney* v. *Finney*, L. R. 1 P. & D. 483.

(*j*) See *Sopwith* v. *Sopwith*, 30 L. J. Matr. 131.

(*k*) See the opinions of the judges in the *Duchess of Kingston's Case*, Appendix B, p. 427; *contra*, *Jones* v. *Bow*, Carth. 225, and Appendix B, p. 411.

held to be not binding on the crown in a subsequent prosecution for bigamy (*l*). So also the verdict of a jury in a divorce suit, followed by judgment that the wife has been guilty of adultery, but not by a decree of divorce, only binds the parties to the suit, and has not the force of a judgment *in rem*, as it does not alter the status of the parties (*m*). And it was held no defence, on the question of agency, in a subsequent action against the husband for necessaries supplied to the wife (*n*).

The dismissal of a petition for divorce before the hearing, is no bar to a fresh petition. Thus, if a husband petitions for divorce, and the petition is dismissed before hearing, on the petitioner's application, and with the consent of the respondent and co-respondent; this dismissal is no bar to a fresh petition by the husband containing the same charges (*o*). And a decree obtained by a husband for a judicial separation does not bar him from subsequently filing a petition for dissolution of marriage (*p*).

4. *Grants of Probate and Administration* (*q*).—A grant of probate or of administration is in the nature of a judgment *in rem*, and is conclusive against all the world (*r*). This has been laid down as follows (*s*); "The first ques-

(*l*) *Duchess of Kingston's Case*, Smith's L. C. (8th ed.) 801, and Appendix B, p. 410.

(*m*) *Needham* v. *Bremner*, L. R. 1 C. P. 583.

(*n*) *Ibid.*

(*o*) *Hall* v. *Hall & Richardson*, 48 L. J. P. D. 57.

(*p*) *Mason* v. *Mason*, L. R. 8 P. D. 21; and see *Green* v. *Green*, L. R. 3 P. & M. 121.

(*q*) See now the Judicature Act 1873, s. 31; and as to the conclusive effect in England of foreign letters of administration, see *MacNichol* v. *MacNichol*, L. R. 19 Eq. 81.

(*r*) *Noel* v. *Wells*, 1 Levinz, 235 b; and Appendix B, p. 414.

(*s*) Per Butler, J., in *Allen* v. *Dundas*, 3 T. R. 125.

tion to be considered is, what is the effect of a probate? It has been contended by the plaintiff's counsel, first, that it is not a judicial act; and secondly, that it is not conclusive. But I am most clearly of opinion that it is a judicial act; for the Ecclesiastical Court may hear and examine the parties on the different sides, whether a will be or be not properly made; that is the only court which can pronounce whether or not the will be good; and the courts of common law have no jurisdiction over the subject. Secondly, the probate is conclusive till it be repealed, and no court of common law can admit evidence to impeach it" (*t*).

But a grant of probate of a will is not conclusive, on a subsequent indictment for forging the will of which probate was obtained (*u*). This may perhaps be considered as an illustration of the general principle affirmed in *Barrs* v. *Jackson* (*v*), that the criminality of the prisoner is a collateral matter which could not have been within the jurisdiction of the Ecclesiastical Court (*x*).

It may here be noticed that the Chancery Division will not, as a rule, interfere to set aside the probate of a will on the ground of fraud, but application should be made to the Probate Division, which has (more especially since the Judicature Acts) the same means of arriving at the

(*t*) See also *Allen* v. *McPherson*, 5 Beav. 469; followed in *Meluish* v. *Milton*, L. R. 3 Ch. D. 27. And see *Da Costa* v. *Villa Real*, 2 Str. 961; *Bunting's Case*, Co. Rep., vol. ii., p. 355; *Kent's Case*, Co. Rep., vol. iv., p. 136.

(*u*) *R.* v. *Buttery & McNamara*, R. & R. C. C. 342 (overruling *R.* v. *Vincent*, 1 Str. 481). And see Appendix B, p. 416, note (*c*).

(*v*) 1 Y. & C. C. C. 585.

(*x*) See also *Blackham's Case*, 1 Salk. 290; and *Robins* v. *Crutchley*, 2 Wils. 122.

truth as the Chancery Division (*y*). The Chancery Division has indeed jurisdiction to grant probate, but it would not be using a sound discretion to exercise the jurisdiction (*z*).

5. *Adjudications in Bankruptcy.*—The file of the proceedings in a bankruptcy has been held to be not in the nature of a record and not to create an estoppel. For instance, the mere fact that the proof of a creditor of an undischarged bankrupt had been upon the file of the proceedings in bankruptcy for upwards of a year, was held not to estop the bankrupt from applying to the Bankruptcy Court (*a*) to reduce the amount of the proof (*b*).

But under the Bankruptcy Act, 1883 (*c*), orders of the High Court of Justice, sitting in bankruptcy, or of a county court having jurisdiction in bankruptcy (*c*), adjudging the debtor to be a bankrupt are conclusive as to the fact of the adjudication (*d*). Similarly an order of discharge under Bankruptcy Act of 1883 (*e*) is conclusive evidence of the bankruptcy and of the validity of the proceedings therein. And certificates of the Board of Trade, under the Act, are conclusive evidence of the facts certified therein (*f*).

(*y*) *Melnish* v. *Milton*, L. R. 3 Ch. D. 27, following *Allen* v. *McPherson*, 1 H. L. Cas. 191.

(*z*) Per M. R. in *Pinney* v. *Hunt*, L. R. 6 Ch. D. 98.

(*a*) Under the Bankruptcy Act, 1869 (32 & 33 Vic. c. 71).

(*b*) *Ex parte Bacon, in re Bond*, L. R. 17 Ch. D. 447.

(*c*) 46 & 47 Vic. c. 52, s. 92. As to the jurisdiction of the High Court before this Act, see *Martin* v. *Pewning*, L. R. 4 Ch. App. 356; *Eyre* v. *Smith*, L. R. 2 C. P. D. 435.

(*d*) *Ibid.*, ss. 20, 132. See also *Revell* v. *Blake*, L. R. 7 C. P. 300; L. R. 8 C. P. 533, decided under the Bankruptcy Act, 1869 (32 & 33 Vic. c. 71), s. 10.

(*e*) S. 30, sub-s. 3.

(*f*) S. 138; s. 140, sub-s. 2.

But orders of the Board of Trade, releasing a trustee, may be revoked on proof that they were obtained by fraud, or by the suppression or concealment of any material fact (*g*). And a debtor is not exempt from being proceeded against for any criminal offence, by reason that he has obtained his discharge, or that a composition, or scheme of arrangement, has been accepted or approved (*h*).

6. *Sentences of Deprivation and Expulsion, whether delivered by the Spiritual Court, a Visitor, or a College.* —It appears that sentences of deprivation and expulsion of members of colleges, under statutes of the founders, by the master and fellows and (or) the visitors on appeal, are judgments *in rem* and conclusive against all the world. Thus, a sentence of expulsion from a college unappealed from, was given in evidence for the defence, on an indictment for assaulting a fellow commoner of Queen's College, Cambridge, by turning him out of the college garden. And it was held conclusive on the ground that it resembled a sentence of the Ecclesiastical Court (*i*).

So also in another case involving the effect of a sentence of deprivation by the bishop, as visitor of Exeter College, Oxford, of the rector of the college (*k*). Holt, C. J., said, "The questions that I make in this case are but these two. The first is, whether or no by the constitution of

(*g*) S. 82, sub-s. 3.

(*h*) S. 167.

(*i*) *R.* v. *Grundon*, 1 Cowper, 315 : Appendix B, p. 416. See also Smith's L. C. (8th ed.) vol. ii. p. 836.

(*k*) *Philips* v. *Bury*, 2 T. R. 346, and Appendix B, p. 415. The opinion of Holt, C. J., though opposed to that of the majority, was upheld in the House of Lords.

this college the Bishop of Exeter had power in this case to give sentence? The second is, supposing he had such a power, whether the justice of this sentence be examinable in this court upon this action? It is, I say, not material whether he hath a Court or no, all the matter is whether he hath a jurisdiction; if he hath a jurisdiction and cognizance of the matter and person, and he giveth sentence in the matter, his sentence must make a vacancy, be it never so erroneous; but there is no appeal, if the founder hath not thought fit to direct one."

In like manner the decision of the trustee of a school dismissing the schoolmaster for misconduct, is not examinable (*l*).

7. *Judgments of outlawry and declarations of legitimacy.*—Judgments of outlawry were judgments *in rem* and conclusive evidence on behalf of strangers, for "where the record of the estoppel runs to the disability or legitimation of the persons, then all strangers shall take benefit of that record" (*m*). And so, it appears, are judicial declarations of legitimacy under the Legitimacy Declaration Act, 1858 (*mm*).

As connected with this subject we may here consider the general effect of bastardy orders. It has been considered doubtful whether a bastardy order was even admissible evidence in subsequent civil proceedings, for the purpose of proving the bastardy (*n*). Possibly the reason for this decision was that bastardy proceedings are quasi-

(*l*) *Doe* d. *Davy* v. *Haddon*, 3 Dougl. 310; *R.* v. *Darlington School Governors*, 6 Q. B. 682.

(*m*) Co. Litt. 352 b.

(*mm*) 21 & 22 Vic. c. 93.

(*n*) *Watson* v. *Little*, 29 L. J. Ex. 267.

criminal in their nature (*o*). And, as will be pointed out hereafter, criminal convictions are not as a rule admitted as evidence in civil proceedings (*p*). But, if a bastardy summons is taken out, and the magistrates make an order thereupon, it is not competent for the mother to apply for an extension of the order on a future occasion (*q*). However, the mere dismissal by the magistrates of an application for a bastardy order, on the ground of want of corroborative evidence, is in the nature of a non-suit, and is not a decision on the merits, and therefore is not a bar to a fresh application for an order (*r*). If, however, on a bastardy summons, there is a hearing on the merits, and the application is dismissed, and on a fresh application to the magistrates, it is distinctly brought to their notice that the case had been fully heard and determined on a previous occasion; they should decline to entertain the second application, and should consider themselves bound by the dismissal. But if the point is not taken on the second hearing, and the magistrates make an order, the Queen's Bench will not quash it (*s*). Again, a decision of Quarter Sessions in bastardy, if on the merits, is a final bar, *e.g.*, if the order is quashed

(*o*) The general nature of bastardy orders, which are now regulated by the Bastardy Laws Amendment Act (35 & 36 Vic. c. 5, amended by 36 Vic. c. 9), is explained in *R.* v. *Jenkin*, Cas. Temp. Hardwicke, 301.

(*p*) See per Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

(*q*) *Williams* v. *Davies*, L. R. 11 Q. B. D. 74.

(*r*) Per Ld. Denman, C. J., in *R.* v. *Machen*, 14 Q. B. 74; *R.* v. *Gaunt*, L. R. 2 Q. B. 466; *Williams* v. *Davies*, L. R. 11 Q. B. D. 74, at p. 76.

(*s*) Per Cockburn, C. J., in *R.* v. *Herrington*, 3 N. R. 468; per Patteson, J., in *Brisby's Case*, 1 Den. C. C. R. at p. 432.

on the ground of insufficiency of corroborative evidence. But if the order is quashed on the ground that it is bad in form, this decision, not being on the merits, is no bar to a fresh application (*t*).

8. *Adjudications of settlement by an order of justices whether unappealed against or confirmed by a Court of Quarter Sessions on appeal.*—Orders of removal of paupers made by justices, if unappealed against, or confirmed on appeal, operate as judgments *in rem*. This has been laid down as follows: "There is no proposition in the law of settlements more clear than this, that an order of removal unappealed against is conclusive against all the world. But it does not affect a subsequent settlement" (*u*). So a judgment of a Court of Quarter Sessions, confirming an order of removal made by justices, is not only conclusive against the parish to which the removal is directed, but, being a judgment *in rem*, is conclusive against all the world, that the pauper, at the time when the order was made, was settled in the parish to which he was sent: for that is the point which the Sessions must have decided when they confirmed the order of removal (*x*).

But a judgment of a Court of Quarter Sessions quashing an order of removal is only conclusive between the contending parishes. This has been laid down as

(*t*) See per Blackburn, J., in *R.* v. *Glynne*, L. R. 7 Q. B. at p. 23, where bastardy orders are fully discussed.

(*u*) Per Buller, J., in *R.* v. *Kenilworth*, 2 T. R. at p. 599.

(*x*) Per Denman, C. J., in *R.* v. *Wick St. Lawrence*, 5 B. & Ad. at p. 533. See, however, the remarks of Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

follows (*y*): "An order of sessions quashing an order of removal is conclusive between the contending parishes, but it is conclusive only as to the point which it decides, *i.e.*, that, at the time when the order of removal was made, the appellant parish was not bound to receive the pauper. It is like an acquittal upon an indictment for not repairing a road, on a plea of not guilty, where the question of liability has not been raised on the record. Such acquittal is no evidence that the parish was not liable, because it may have proceeded on a different ground, viz., either that the road was not out of repair or was not a public highway. So an order of sessions, quashing an order of removal, may have proceeded, either on the ground that the pauper was not settled in the appellant parish, or that he was not chargeable, or that he was irremovable. By analogy, therefore, such an order of sessions cannot be conclusive evidence that the pauper was not settled in the appellant parish" (*z*).

It was formerly held that orders of removal unappealed against, or confirmed on appeal, were conclusive, not only of the facts directly decided, but of those matters also which it was necessary to decide, and which were actually decided as the groundwork of the decision itself, although not directly the point at issue (*a*). But the correctness of this decision has been doubted by the Lord Chancellor in a recent case (*b*). And it

(*y*) Per Parke, J., in *R.* v. *Wick St. Lawrence*, 5 B. & Ad. 533, at p. 535.

(*z*) See also *R.* v. *Clint*, 11 A. & E. 624 (note); *R.* v. *Evenwood*, 3 Q. B. 370.

(*a*) *R.* v. *Hartington*, 4 E. & B. 794.

(*b*) *R.* v. *Hutchins*, L. R. 6 Q. B. D. 300.

certainly does not seem in accordance with the rule laid down in the opinions of the judges in the *Duchess of Kingston's Case* (*c*), that neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment (*d*).

9. (*a.*) *Judgments and orders made by courts of summary jurisdiction, under special statutory powers.*—The following are examples of these.

An Act of Parliament (*e*) empowered justices finally to decide the matter of repair of the highway, and to allot to certain parishes such parts of their common highway as were to be repaired by them respectively; and it enacted, that after the justices' order for repair had been filed, the inhabitants of the respective parishes to whom the parts had been allotted for purposes of repair, should be bound as of common right to maintain and keep in repair the parts of the common highway so allotted to them, and should be liable to be indicted for neglect of such duty. Held, on an indictment against one of the parishes, to which a certain part of the common highway had been allotted and against which a justices' order had been made, for non-repair of the same, that the justices' order was conclusive evidence against the said parish,

(*c*) Appendix B, p. 421.

(*d*) By 14 & 15 Vic. c. 105, s. 12, orders under seal made by the Local Government Board in cases of disputes as to settlement submitted to them by guardians and overseers are in certain cases conclusive between the parties thereto.

(*e*) 34 Geo. 3, c. 64.

of its liability to repair the part of the highway which had been allotted to it (*f*).

Again, it was enacted by another Act (*g*), that justices of the peace, having jurisdiction within the limit within which a highway was situated, should have power to make presentment of such respective limit of any highway as was not well and sufficiently repaired, and that every such presentment should have the same force and effect in law, as if it had been presented and found by the oaths of twelve men. On an indictment for non-repair of part of a highway against the inhabitants of H., the prosecution having produced in evidence the record of a presentment made by a justice, under the above statute, averring that the part of the highway in question was out of repair, and that it was in the township of H., and that the inhabitants of that township ought to repair it, and showing a submission to the said presentment, and a plea of guilty by two inhabitants of the township of H. on behalf of the said township, a conviction before the quarter sessions, and a sentence of fine; held, that the record was an estoppel against the township of H., and concluded them from showing that the road was not in their township (*h*).

But in *R.* v. *Hutchins* (*i*) defendant was summoned

(*f*) *R.* v. *Hickling*, 7 Q. B. 880. This case is sometimes cited as an instance of a judgment *in rem* (see Pitt-Taylor on Evidence, 7th ed. vol. ii.), but it seems that it was unnecessary, for the purposes of the above case, to decide, and that it was not in fact decided therein that such an order would be binding on all persons and for all purposes.

(*g*) 13 Geo. 3, c. 78, s. 24.

(*h*) *R.* v. *Haughton*, 1 E. & B. 501; but see *R.* v. *Hutchins*, L. R. 6 Q. B. D. 300.

(*i*) L. R. 5 Q. B. D. 353; L. R. 6 Q. B. D. 300.

by an urban authority, under the Public Health Act, 1875 (*k*), as owner of premises abutting on a street, for payment of a quota of the expenses incurred by such urban authority in paving &c. such street, and at the hearing before the justices, they dismissed the complaint on the ground that the street was a highway repairable by the inhabitants of B. at large. Subsequently, similar proceedings were taken by the same urban authority against C., another adjoining owner, and, upon evidence which was not before them on the first occasion, the justices came to an opposite conclusion, and ordered payment by C. of the amount then claimed against him, on the ground that the said street was not a highway repairable by the inhabitants at large. Subsequently, defendant was summoned a second time by the same urban authority, under the same Act, for payment of another quota of expenses incurred by them in paving &c. the same street ; and it was agreed, on the hearing of the second summons before the stipendiary magistrate, that all the evidence in C.'s case should be treated as being then before him, and upon that evidence he found defendant liable. Held by the Court of Appeal, Lord Selborne presiding, reversing the decision of the Divisional Court, that the order of dismissal by the justices, of the first summons, was not conclusive between the parties thereto, in the proceedings on the second summons, on the point as to whether or not the street was a highway repairable by the inhabitants at large ; and consequently that the urban authority were not estopped thereby from recovering the quota of expenses

(*k*) 38 & 39 Vic. c. 55.

claimed by them on the second summons (*kk*). Lord Selborne in his judgment says, "We have in this case nothing at all to do with any judgment *in rem*. If we had, there might be ground for holding that there were two cross and contradictory estoppels, one by the judgment for the present defendant in 1874 (*l*), and the other by the contrary judgment against C., the effect of which might have been to set the whole matter at large. But here there is no proceeding *in rem*, no question of status, and if the case which was quoted to us of *The Queen* v. *The Inhabitants of Hartington* (*m*) was correctly decided (as to which I feel considerable doubt), it is not relevant. We are not in this called upon to determine how far, or under what conditions, an order of a court of summary jurisdiction may operate between the parties to it as an estoppel. Assuming that it may do so to some extent and under some conditions, I conceive it to be clear that it cannot so operate, first, as to any matter as to which that court had no authority to adjudicate directly and immediately between the parties; secondly, as to any matter incidentally coming in question, as to which a finding, if held to be conclusive between the parties, would operate in prejudice of the rights of others not parties to the proceeding; or, thirdly, as to any incidental matter, not otherwise determined than as having been the particular ground on which the Court dismissed a charge or complaint.

"The Justices before whom the complaint of the urban

(*kk*) See also *Leith Harbour &c. Commissioners* v. *Inspector of Poor*, L. R. 1 Sc. App. 17.

(*l*) *i.e.*, on the first summons.

(*m*) 24 L. J. M. C. 98: and *ante*, p. 92.

authority came, on the 7th of May, 1874 (*n*), had no jurisdiction to adjudicate directly or immediately between these parties (or between any parties whatever), on the question whether Mill Street (*o*) was or was not a highway repairable by the inhabitants of B. at large. That was, at the most, a matter 'incidentally cognisable' by them. No conclusion which they might form upon it would establish (in the one case) or disprove (in the other) any such liability as against or in favour of the inhabitants. Their only jurisdiction was to make or refuse the order for payment of a certain sum of money then claimed as the defendant's statutable quota of certain expenses at that time incurred by the urban authority.

"To hold the Crown or the urban authority estopped for ever from claiming payment of the defendant's quota of any other expenses of a like character afterwards incurred in respect of the same street, because, on the 7th of May, 1874, the Justices of the petty sessions held the street to be a highway, repairable by the inhabitants at large, would (if it were not really such a highway) be to deprive the other adjoining landowners who were not parties or privies to the proceeding, of their statutable right to have a just rateable contribution from the defendant and his successors in estate to all future expenses apportionable among all the adjoining landowners under section 150 of the Public Health Act. And if the decision under appeal is correct, it would follow (perhaps *à fortiori*) that Mr. C. and all persons claiming under him are also estopped from asserting that Mill Street is a highway repairable

(*n*) *i.e.* on the first occasion. (*o*) The street in question.

by the inhabitants at large. There would, therefore, be within the same district two laws operating simultaneously in opposite directions, as against different persons in exactly the same circumstances, under the same words of taxation in the same public Act of Parliament, and either imposing upon some of those individuals, and their privies in estate, a liability which the statute had not in fact imposed, or exonerating others and their privies in estate (to the prejudice of the rest) from their share of a common burden, which the statute had imposed equally upon all.

"Furthermore, the order of dismissal cannot, in my opinion, have any greater force or effect by way of estoppel than if it had been actually drawn up in the proper form prescribed by 11 & 12 Vict. c. 43, s. 14, Sched., Form L., in which case it would only have found that the complaint of the urban authority was 'not proved.' Such an order, being at the most equivalent in this quasi-criminal proceeding to an acquittal, could not have operated as an estoppel, except against a repetition of the same demand for the same quota of the same expenses. See Buller's Nisi Prius, p. 245; 1 Gilbert on Evidence (Loft's edition), p. 34; *R.* v. *Inhabitants of Barbon* (*p*)."

(β.) *Judgments and orders made under special statutory powers generally* (*q*).—The facts necessary to give juris-

(*p*) 5 M. & S. 392; *Frampton* v. *Pettis*, 3 Levinz, 23.

(*q*) As to an order under the Extradition Act, 1870, 33 & 34 Vict. c. 52, see *R.* v. *Maurer*, L. R. 10 Q. B. D. 513. If an Act of Parliament prescribes a particular remedy to be obtained by instituting proceedings before a court of summary jurisdiction, this by implication takes away any other remedy; *Great Northern*

diction must, as a rule, appear on the face of such judgments or orders. Thus, even an order made by the Lord Chancellor, under a special statutory power, must show on the face of it whatever is necessary to give him jurisdiction (*r*). Thus, in the above case, Coleridge, J., says, "However high the authority may be, where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute. Whether the order be made by the Lord Chancellor, or by a justice of the peace, the facts which gave the authority must be stated."

And in order to determine to what extent such judgments and orders are conclusive in their operation, it is usually necessary to examine the Act or Acts of Parliament creating the jurisdiction. Thus, where, by an Act of Parliament, an action might be brought upon the certificate of commissioners that certain monies were due from an agent to officers of the army, it was held that, if such an action were brought, the certificate of the commissioners was conclusive as to the fact of the monies being owing, and could not be controverted (*s*). Again, under the Stamp Act 1870 (33 & 34 Vict. c. 97), the decisions of commissioners of Inland Revenue respecting stamp duty, are in certain cases conclusive.

Steamship Fishing Co. v. *Edgehill*, L. R. 11 Q. B. D. 225; and see, with respect to certain proceedings to be taken in the County Court, The Employers' Liability Act, 1880, 43 & 44 Vict. c. 42.

(*r*) *Christie* v. *Unwin*, 11 A. & E. 373, 379. The same rule applies to the judgments of courts of inferior jurisdiction, see *ante*, pp. 43—45.

(*s*) *Moody* v. *Thurston*, 1 Str. 481.

So also by Stat. 14 & 15 Vict. c. 105, s. 12, orders made by the Local Government Board in certain cases of dispute as to settlements, are conclusive (*t*).

The importance of referring to the special Act or Acts of Parliament creating a jurisdiction, for the purpose of ascertaining the effect of judgments and orders made in the exercise of that jurisdiction, is further shown by the two following cases which were decided under the Parliamentary Elections Act, 1868 (*u*). By section 29 of the above Act, the court held by a judge to try an election petition under the said Act, was to be a court of record. By section 11, subsection 13, of the Act, it was enacted that the determination of the judges, on the trial of an election petition, whether the member whose return or election was complained of, or any and what other person, was duly returned or elected, or whether the election was void, should, upon a certificate in writing being given by the said judge to the Speaker of the House of Commons, be final to all intents and purposes. It was accordingly decided in a case under the Act (*x*) that a determination of the judge under the above Act, after certificate given, was binding and conclusive upon everybody: and that, even in the case of the trial on the election petition having been collusive, it was not competent for the Court of Common Pleas (the court to which, by section 5 of the above Act, the petition had to be presented), to examine

(*t*) See *ante*, p. 93; and, as to certificates given and orders made by the Board of Trade, under the Bankruptcy Act, 1883, see 46 & 47 Vict. c. 52.

(*u*) 31 & 32 Vict. c. 6 (now repealed).

(*x*) *Waygood* v. *James*, L. R. 4 C. P. 361.

the collusion, or to order a second investigation of the matter, though it might be in the power of the House of Commons to order one (*y*). Again, it was enacted by section 11 of the above Act, that where a charge was made in the election petition, of any corrupt practices (*z*) having been committed at the election, the judge should, in addition to his certificate, and at the same time, report thereon to the Speaker: and by section 11, subsection 15, of the same Act, the judge might, at the same time, make a special report to the Speaker concerning any other matters arising in the course of the trial, as he might think proper. But it was held, in another case arising under the above Act, that the judge's report under the Act was not, like his certificate, conclusive of the facts therein stated, in a subsequent election petition (*a*)

10. *Sentences of Courts-Martial.*—Courts-martial are courts of limited jurisdiction established by Act of Parliament. They are not courts of record (*b*).

(*y*) See per Willes, J., L. R. 4 C. P. at p. 369.

(*z*) By the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51, s. 11), the term "illegal practices" is substituted for "corrupt practices."

(*a*) *Stevens* v. *Tillett* (Norwich election petition), L. R. 6 C. P. 147.

(*b*) Per Kelly, C. B., in *Scott* v. *Stansfield*, L. R. 3 Ex. at p. 223. Their jurisdiction extends over (*a*) certain offences, in respect of military or naval service, which are specified by statute, and (*b*) certain civil, *i.e.*, non-military or non-naval offences, which are also specified by statute. The jurisdiction of military courts-martial is now regulated by the Army Discipline and Regulation Act, 1879, 42 & 43 Vict. c. 33; that of naval courts-martial by the Navy Discipline Act, 1866, 29 & 30 Vict. c. 109. The ordinary jurisdiction of courts-martial is, however, extended in certain cases and under certain exceptional circumstances, *e.g.*, beyond the

There is, however, no court of law in which an appeal can be brought against the proceedings or sentence of a court-martial, in cases where the prisoner and the offence are within its jurisdiction.

But courts-martial are subject to proceedings by way of prohibition in the High Court of Justice, if they exceed their jurisdiction. Thus Lord Loughborough, in speaking of a court-martial, says (*d*): "This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of Westminster Hall, must depend upon the same rules with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the courts of Westminster Hall for a prohibition. Naval courts-martial, military courts-martial, courts of Admiralty, courts of prize, are all liable to the controlling authority which the courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them; the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance."

And, therefore, notwithstanding the sentence of a court-martial, a civil court is not precluded from entertaining, in a civil action, the question whether or not the offence committed was within the jurisdiction of the court-martial which adjudicated upon it.

seas, in default of a competent civil judicature, in time of war, &c. See Simmons on Courts-Martial (6th ed.), p. 14.

(*d*) *Grant* v. *Gould*, 2 H. Bl. at p. 100.

Thus, it has been decided (*e*), that an action of trespass lies for an inferior military officer against his superior officer (both being under martial law), who imprisoned him for disobedience to an order made under colour, but not within the scope of military authority, although the imprisonment was followed by a court-martial, which, it appears, had convicted him.

There does not seem to be any express decision on the point whether or not the sentence of a court-martial operates as a judgment *in rem*, though it is considered by some authorities that it may take effect as such (*f*).

It appears, however, that it may operate as an estoppel, in a subsequent action for false imprisonment. Thus, in an action for false imprisonment brought by a master of a man-of-war against his captain, in which the defence was that the plaintiff was put under arrest, in order to bring him to a court-martial, and that he was brought to a court-martial and was sentenced thereby, it appears that the sentence of the court-martial might have been considered to be conclusive, if it had been pleaded by the defence by way of estoppel (*g*).

There seems, indeed, to be no reason why the sentence of a court-martial, over a matter within its jurisdiction, being the sentence of a court of competent jurisdiction,

(*e*) *Warden* v. *Bailey*, 4 Taunt. 67.

(*f*) See Pitt-Taylor on Evidence (7th ed.), p. 1403; and Smith's L. C. (8th ed.), vol. ii., p. 835; and see *R.* v. *Suddis*, 1 East, 306; *Re John Walter Poe*, 5 B. & Ad. 681.

(*g*) The sentence, however, was not pleaded, and there was a verdict for the plaintiff for substantial damages. See *Hannaford* v. *Hunn*, 2 C. & P. 148.

should not have an equal binding effect to that accorded to a judgment of any other court of criminal jurisdiction (*h*). On the other hand it would appear unlikely that a court, not of record, having this limited jurisdiction and established under special Act of Parliament for a particular purpose, would, at any rate in time of peace and under ordinary circumstances, have a binding effect given to its decisions superior to that accorded to the decisions of other criminal courts, even of general criminal jurisdiction, throughout the country.

11. *Judgments on proceedings by way of quo warranto.* —The old writ of quo warranto was in the nature of a writ of right to the Crown, against him who claimed or usurped any office, franchise, or liberty, to inquire, in order to determine the right, by what authority he supported his claim. It lay also, in case of non user or long neglect of a franchise, or misuser or abuse of it, being a writ commanding the defendant to show by what warrant he exercised such franchise, office, &c. In case of judgment for the defendant, he had an allowance of his franchise, office, &c. But in case of judgment for the Crown, "for that the party is entitled to no such franchise, &c. (or hath disused or abused it)," the franchise, &c., was either seized into the sovereign's hands, or there was merely judgment of ouster to turn out the party who usurped it. The judgment on a writ of quo warranto was final and conclusive even against the Crown. The old writ of quo warranto has, however,

(*h*) As to the latter, see the remarks of Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

been superseded by an information filed in the Queen's Bench by the Attorney-General, in the nature of a writ of quo warranto, wherein the process is speedier, and the judgment not quite so decisive. The proceeding by way of quo warranto is properly a criminal method of prosecution, to punish the usurper by a fine for usurpation, as well as to oust him or seize it for the Crown. But it has long been applied to the mere purposes of trying the civil right, seizing the franchise, &c., or ousting the wrongful possessor: the fine being nominal only. It is therefore considered, in modern practice, as merely a civil proceeding, and the court will grant a new trial, though the verdict should have been for the defendant (*i*).

The nature of the proceedings on a writ of quo warranto, and also the difference between the effect of a judgment on a writ of quo warranto, and on an information in the nature of a quo warranto, are explained by Holt, C. J., as follows (*k*): "A quo warranto is in the nature of a writ of right, to which the defendant can have no plea but to justify or disclaim, and cannot plead not guilty: and judgment both for and against the king is final. But the judgment in an information in the nature of a quo warranto, if against the defendant, is final, but not if against the king." Thus defendant, in answer to a writ of quo warranto, could not plead non usurpavit, *i.e.*, that he did not usurp the office (*l*).

(*i*) See Stephen's Commentaries (7th ed.), vol. iii., pp. 638 *et seq.*

(*k*) *Anon. Case*, 12 Mod. 225.

(*l*) *R.* v. *Blagden*, 10 Mod. at p. 229. However, by 32 Geo. 3 c. 58, it was enacted that it should

There are one or two decisions on the effect of judgments in ouster on informations in the nature of quo warranto which may be noticed here. Thus, on an information by quo warranto for acting as one of the bailiffs of a corporation, defendant justified by claiming title under two former bailiffs, A. and B. The prosecution thereupon produced a record of a judgment of ouster, on a quo warranto, against A. and B. Held that this was good evidence against defendant, especially as he claimed under them: and that such judgments have been often given in evidence against third persons. But the Court said that it was not conclusive evidence, for defendant might have proved that the judgment was obtained by collusion, or that the first defendants were restored (*m*). Again, on an information by quo warranto against defendant for acting as one of the chief burgesses of a borough, a special verdict (on an information by quo warranto against A., who had presided as mayor at the election of defendant into the office of capital burgess, and which resulted in judgment of ouster against A.), was held to be admissible, but not conclusive, evidence against defendant, of the facts found therein (*n*). But in proceedings of mandamus to defendants to certify the election of one W. as recorder of York, in which the point raised was whether W. or S. had been

be lawful for the defendant, to any information in the nature of quo warranto, for the exercise of any office, &c., to plead a prescriptive title of six years' duration previous to the exhibition of the information. See also 7 Will. 4 & 1 Vict. c. 78; and 6 & 7 Vict. c. 89.

(*m*) *R.* v. *Hebden*, 2 Str. 1109; and 2 Selwyn's N. P. (13th ed.), p. 1136.

(*n*) *R.* v. *Grimes*, 5 Burr. 2599.

elected as such recorder, an information by quo warranto against one A., a common councilman, who had voted for S., charging him with usurping the office of common councilman, and resulting in a conviction and judgment of ouster, was held conclusive evidence against defendants, to show that A. was not a common councilman when he voted for S., and that therefore the election of S. was void (*o*).

These decisions seem to be plainly in accordance with the rules laid down in the opinions of the judges in the *Duchess of Kingston's Case* (*p*), respecting the admissibility and effect of judgments and verdicts in subsequent proceedings. It does not appear to have been actually decided in any of them, that a judgment of ouster on an information by quo warranto, operated as a judgment *in rem* (*q*).

12. *Convictions on criminal prosecutions and inquisitions.*—It may, perhaps, be considered that the definition of a judgment *in rem* given above (*r*), would include convictions on criminal prosecutions and inquisitions (*s*), but

(*o*) *R.* v. *Mayor of York*, 5 T. R. 66. As to an estoppel on a corporation arising from an assessment made by them in obedience to a mandamus, see *R.* v. *Mayor, &c., of Sandwich*, 10 Q. B. 563.

(*p*) Appendix B, pp. 121, *et seq.* It is a noticeable fact that the expression "judgment *in rem*," does not occur anywhere in the opinions of the judges in the *Duchess of Kingston's Case*.

(*q*) See further as to proceedings on quo warranto, Selwyn's N. P. (13th ed.), vol. ii., pp. 1110 *et seq.*

(*r*) See *ante*, p. 75.

(*s*) Some learned writers on the law of Evidence have criticised this definition with reference to the effect of criminal convictions and inquisitions. See Pitt-Taylor on Evidence (7th ed.), pp. 1400, 1401; and Phillipps on Evidence, vol. ii., p. 6, note 1. Pitt-Taylor considers that criminal convictions are subject to the same rules as judgments *inter partes*.

they cannot be treated for all purposes as on the same footing with judgments *in rem*, properly so-called, although they do in certain cases resemble them.

As regards the effect of criminal convictions upon subsequent civil proceedings, an important distinction which formerly existed between criminal and civil cases must be borne in mind. This distinction arose from the fact that whereas in a civil action neither party was allowed to give evidence in his own behalf (*t*), if the plaintiff prosecuted the defendant criminally, he would be allowed to give evidence on behalf of the prosecution; the reason for this distinction being that the Crown is always in the eye of the law, one of the parties to a criminal prosecution, the prisoner or defendant being the other (*u*). The result was that a criminal conviction could not be made use of by the prosecuting party in subsequent civil proceedings between him and the convicted party (*x*), as the conviction might have been obtained upon his evidence, and it would in effect be allowing him to give evidence in his own cause (*y*). Thus, Best, C. J., says (*z*), "I mean not to infringe upon the principle that a verdict in a criminal case cannot be given in evidence by the prosecutor in support of a civil action. We should, as far as we can, take from prosecutors every temptation to go beyond the truth in their evidence (*a*)."

(*t*) This distinction was abolished by Lord Brougham's Act, 14 & 15 Vict. c. 99.

(*u*) See Stephen, J.'s General view of the Criminal Law of England, chap. II., p. 25.

(*x*) *Smith* v. *Rummens*, 1 Camp. 9; *Hathaway* v. *Barrow*, 1 Camp. 151.

(*y*) *Gibson* v. *McCarthy*, Cas. temp. Hardwicke, 311.

(*z*) *Brook* v. *Carpenter*, 3 Bing. at p. 300.

(*a*) The learned judge says,

And, in an action by A. against B., for stopping up a road, in which B. sought to bar A. from his action by producing a conviction against him for stopping up the same road, the conviction was held inadmissible (*b*). Alderson, B., said, "The Crown and subject were the parties to the indictment, and therefore it was not between the two parties to this action. The distinction is shown by the authority cited in Viner's Abridgement, Estoppel, F. 35 (*c*)."

So also in an action of trespass for battery, after the conviction of defendant of a battery in a criminal prosecution, it was held that the conviction was inadmissible against defendant in the civil action, on the ground that no record of conviction or verdict could be given in evidence but such as both parties might have produced (*d*).

Another reason may be assigned for the non-admissibility of criminal verdicts as evidence in civil cases, viz., that in the criminal trial defendant could not attaint the jury as he would have been entitled to do if injured in a civil action (*e*). But, on the other hand, it is stated on good authority (*f*), that there are many cases where a

however, "This is a general rule, but necessity has occasioned some exceptions to it. A prosecutor obtains, by the conviction of a felon, restitution of his goods, and yet the prosecutor is a competent witness on the trial of the felon." See also as to exceptions in certain cases of forfeiture following on a conviction, *Davis* v. *Nest*, 6 C. & P. 167.

(*b*) *Petrie* v. *Nuttall*, 25 L. J. Ex. 200.

(*c*) The passage in Viner seems, however, to be in support of the proposition that a confession which is not absolute, works no estoppel; and see further as to that rule, Bro. Estop. pl. 132.

(*d*) *R.* v. *Warden of the Fleet*, 12 Mod. 337.

(*e*) Gilbert on Evidence, p. 26.

(*f*) Buller's N. P. p. 245, note *a*.

verdict may be given in evidence against a party who could not have an attaint, as for instance: those which establish customs and public rights, where the verdict is always received in evidence against those who are not parties and privies. Thus, in a case already cited (*g*), Alderson, B., says, "No doubt the judgment in the indictment may be given in evidence upon the trial of the issue as to whether the *locus in quo* is a public highway, but it cannot be pleaded as an estoppel."

In the same way, criminal verdicts were not, as a rule, received as evidence in matters over which the ecclesiastical court had exclusive jurisdiction. Thus, if a man had two wives, and was convicted of bigamy, and died, and the second wife claimed dower, the verdict and conviction could not be given in evidence; but the writ had to go to the bishop: for whether the marriage was lawful or not, was the point in controversy, and that was of ecclesiastical jurisdiction, and was not to be decided at common law (*h*).

The same rule appears to have been followed in proceedings on a petition for dissolution of marriage for bigamy and adultery, in which proof of a conviction for bigamy was considered as a matter of course to be insufficient (*i*). On the other hand, a conviction for

(*g*) *Petrie* v. *Nuttall*, 25 L. J. Ex. 200. The judges were not unanimous. Martin, B., says, "I feel strongly the force of Mr. Mellish's argument, that if the judgment in this indictment is conclusive against the party convicted and all persons claiming under him, it is absurd that those who are bound by that judgment should be able to bring an action against anyone who uses the highway."

(*h*) Gilbert's Evidence, p. 28.

(*i*) *March* v. *March*, 28 L. J. P. & Matr. 30. The respondent,

bigamy in marrying A. was a bar to the convicted party, so as to prevent him subsequently taking proceedings against A. in the ecclesiastical court, *pro jactitatione maritagii*, and if he did so, A. would be entitled to a prohibition (*k*). And it appears that a criminal conviction is at any rate conclusive in a civil case, as to the fact of the prisoner having been convicted. Thus, in *Castrique* v. *Imrie* (*l*), Blackburn, J., says, "A judgment in an English Court is not conclusive as to anything but the point decided, and therefore a judgment of conviction, or an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill; though the conviction must have proceeded on the ground that the bill was forged."

The deduction from the cases cited appears to be that, with the exceptions there indicated, criminal verdicts of guilty are not as a rule evidence in civil cases; but on the other hand, a verdict in a civil case may be given in evidence in a criminal case (*m*).

It appears, however, that originally criminal convictions operated to a certain extent as judgments *in*

however, did not appear, and there was no discussion on the point; see also *Hart* v. *McNamara*, 4 Price 154, note.

(*k*) *Boyle* v. *Boyle*, 3 Mod. 164, and Appendix B, p. 117.

(*l*) L. R. 4 H. L. at p. 434.

(*m*) *Richardson* v. *Williams*, 12 Mod. 319, but the report is too scanty to be of much value. One reason may possibly be that the king is not bound by estoppels, though he may take advantage of them. Vin. Ab. Estop. p. 432; and Co. Inst., part ii., p. 39. And it would appear from this that verdicts in civil cases might be used on behalf of the Crown in criminal cases, but not on behalf of the prisoner.

rem (*n*). For although verdicts in civil cases did not bind strangers, because they could not have attaint thereof, yet, if a man was found guilty on an indictment, inasmuch as no one could have attaint of it, it acted as an estoppel towards everybody (*o*). And although proceedings by attaint are now abolished (*p*), the distinction still exists, that verdicts in civil cases may be set aside at the instance of either of the parties thereto, but verdicts in criminal cases cannot. Moreover, criminal convictions for treason, or for a felony if followed by a sentence of death, were like judgments *in rem*, inasmuch as they were followed by attainder which involved forfeiture and corruption of blood (*q*).

It appears that acquittals in criminal cases are not as a rule evidence in civil cases, for much less evidence is necessary to maintain the action than to attaint the criminal, and therefore his acquittal was no argument that

(*n*) Bro. Estop. pl. 163; Vin. Ab. p. 444.

(*o*) Bro. Estop. pl. 163. If a party is attainted by his own confession, this is no estoppel to a stranger. But see Vin. Ab. Estop. p. 449, and Bro. Estop. pl. 64, to the effect that a stranger can take advantage of it, for it cannot be reversed. In trepass for assault the defendant pleaded not guilty, and plaintiff estopped him, because he was indicted thereof at another time, and traversed it, and said that it was of the assault of the plaintiff and so to issue, and afterwards waived it, and confessed the traverse. Held, that the confession estopped him from pleading not guilty and from pleading son assault demesne. See further, as to the difference between the effect of a confession to an indictment, and a verdict of guilty thereon, *R.* v. *Templeman*, 1 Salk. 55.

(*p*) 6 Geo. 4, c. 50, ss. 60, 61; 3 & 4 Will. 4 c. 91, s. 47.

(*q*) See Co. Litt. 352 *b*. As to judgments that run to the disability or legitimation of the person, see *ante*, p. 89; and as to judgments involving forfeiture, see Mr. Justice Blackstone's reasons in *Scott* v. *Shearman*, 2 Sir W. Bl. 977, *ante*, p. 78.

the fact was not true (*r*). Another reason is given in Buller's Nisi Prius (*s*) viz., "that an acquittal ascertains no fact as a conviction does." However, if a conviction of A. is evidence that he was convicted, it seems a natural inference that an acquittal of A. is evidence that he was acquitted. But it cannot be pleaded as an estoppel in a subsequent civil action (*ss*).

Criminal convictions, in their operation upon criminal cases, appear to be subject to rules similar to those applicable to judgments *inter partes*. Thus a verdict of guilty upon an indictment for the non-repair of a road is conclusive evidence in a subsequent indictment against the same parish for non-repair of the same road (*t*). So also where defendant was indicted for non-repair of a highway, which it was alleged he was liable to repair *ratione tenuræ*, and to prove his liability evidence was given of the conviction of W. S., a former owner and occupier of the same lands, for non-repair of the same highway; and evidence was also given of the repair of the said highway, subsequently to the said conviction, by the occupiers of the said lands; and that public notice of the liability to repair was given when the said lands were offered for sale, and that defendant, who purchased the lands after the said notice, was then the owner and

(*r*) Gilbert on Evidence, p. 27. Neither is the conviction an argument that the fact was true. See per Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. at p. 434, *ante*, p. 111.

(*s*) P. 245, note a. See also Phillipps on Evidence, vol. i. p. 338.

(*ss*) *Helsham* v. *Blackwood*, 20 L. J. C. P. 187.

(*t*) *R.* v. *St. Pancras*, Peake's Nisi Prius Cases, 219. In a civil proceeding, if not guilty were pleaded, the civil right was not bound; see *R.* v. *Burbon*, 5 M. & S. 392.

occupier of them; it was held, by the majority of the judges, that defendant was estopped from denying his liability, in consequence of the conviction of W. S. with whom he was privy in estate (*u*).

An inquisition, properly so called, is the written statement or finding of a jury, returned for the purpose of a particular inquiry, as distinguished from an indictment, which is an accusation by the oath of jurors returned to inquire generally of all offences within the county. Where it contains the subject-matter of accusation, it is equivalent to the finding of a grand jury (*x*).

It appears that the finding in an inquisition taken under a commission is evidence of the facts so found, but not conclusive evidence, so as to bind third parties (*y*). Thus an inquisition taken under a commission from the Court of Exchequer was held to be admissible, but not conclusive evidence of the facts stated in the return (*z*). So also an extent of Crown lands in the Exchequer was evidence in subsequent proceedings on behalf of the Crown, being the result of an inquiry by a public officer on a public matter (*a*).

Inquisitions in lunacy are not conclusively binding upon third parties, although they are admissible in

(*u*) *R.* v. *Blakemore*, 2 Denison's C. C. R. 410.

(*x*) Jervis on Coroners (4th ed.), p. 242.

(*y*) *Irish Society* v. *Bishop of Derry*, 12 Cl. & F. at p. 666.

(*z*) *Tooker* v. *Beaufort*, 1 Burr. 146; Sayer, 297.

(*a*) *Rowe* v. *Brenton*, 3 M. & R. 164. See further as to inquisitions by sheriff's juries under the Lands Clauses Consolidation Act, 1845, the cases collected in Roscoe's Nisi Prius Evidence (12th ed.), pp. 195—197.

evidence against them (*b*). In fact, such findings are usually *ex parte* (*c*).

The result of a finding on a coroner's inquisition was sometimes forfeiture of goods, *e.g.*, in the case of a presentment of a *fugam fecit* (*d*), or where the coroner found a deodand (*e*). The finding of *fugam fecit* before the coroner, it seems, was not traversable in subsequent proceedings (*f*). But the finding of a deodand was (*g*). But the former was conclusive in an action of trespass brought against the coroner's officer for seizing the goods forfeited (*h*). But an inquisition taken before the coroner *super visum corporis* and resulting in a finding of *felo de se*, is not absolutely conclusive. Thus it is stated as follows in 1 Hale, P. C. 416 (*i*). "But although an inquisition taken before the coroner *super visum corporis* in the point of *felo de se* is of great authority and a sufficient record, whereupon process may be made against those

(*b*) *Faulder* v. *Selk*, 3 Camp. 126; *Sergeson* v. *Sealey*, 2 Atk. 412; *Prinsep & East India Co.*, v. *Dyce Sombre*, 10 Moo. P. C. C. 232.

(*c*) *Hassard* v. *Smith*, Ir. Rep. 6 Eq. 429; *Bannatyne* v. *Bannatyne*, 2 Robertson's Eccl. Rep. at p. 476. The effect of inquisitions in lunacy upon subsequent civil proceedings is fully discussed in the arguments in *Hume* v. *Burton*, 1 Ridgway's P. R. 204. As to the presumption arising from an inquisition, see *Frank* v. *Frank*, 2 Moo. & Rob. p. 315, note a.

(*d*) Jervis on Coroners (4th ed.), p. 226.

(*e*) Jervis on Coroners (4th ed.), p. 37. Deodands are now abolished, see *ibid.*

(*f*) 1 Hale, P. C. 416; and see reasons of Mr. Justice Blackstone in *Scott* v. *Shearman*, 2 Sir W. Bl. 977, *ante*, p. 78.

(*g*) 1 Hale, P. C. 421; and see arguments of counsel in *Garnett* v. *Ferrand*, 6 B. & C. at p. 616.

(*h*) See reasons of Mr. Justice Blackstone in *Scott* v. *Shearman*, 2 Sir W. Bl. 977, *ante*, p. 78.

(*i*) See also the arguments of counsel in *Garnett* v. *Ferrand*, 6 B. & C. at p. 616.

that detain the goods found in the inquisition, yet it seems to me that it is traversable (*k*) in the very point so found, for it is but an inquest of office, and whereupon the party grieved thereby can have no attaint: but otherwise it is of a presentment of a *fugam fecit* before the coroner." But the finding of a *felo de se* was at any rate conclusive as to the change of property in the goods (by forfeiture) of the deceased, against his executors or administrators (*l*). But if the inquisition was found, not before the coroner, but before justices of the county or even before the King's Bench, it did not bind the executors or administrators (*m*).

(*k*) But see *contra* Mr. Justice Blackstone's reasons in *Scott* v. *Shearman*, 2 Sir W. Bl. 977. The finding before the coroner of *fugam fecit* was not traversable in subsequent proceedings.

(*l*) 3 Inst. 55.

(*m*) See *ibid.*

CHAPTER V.

FOREIGN JUDGMENTS.

It has already been pointed out that foreign judgments do not stand upon the same footing as the judgments of an English court of record (*a*).

And it may here be observed, that whatever rules may have been established in favour of the conclusiveness of foreign judgments, apply with at least as much force to judgments in our own colonies, for, "a regular mode having been provided by which an erroneous judgment of a colonial court may be examined and reversed, that mode ought to be pursued" (*b*). Therefore, where a party to a colonial judgment does not pursue that mode of redress, it affords an additional argument against him, and in favour of the validity of the judgment.

"The judgment of a foreign court amounts only to an agreement on which an action of assumpsit will lie, but does not constitute a debt of a higher order. Although it may amount to accord, it does not constitute satisfaction, and

(*a*) *Ante*, Chapter II., p. 18.

(*b*) Per Lord Campbell in *Bank of Australasia* v. *Nias*, 20 L. J. Q. B. 284; and see *Simpson* v. *Fogo*, 29 L. J. Ch. 657; 32 L. J. Ch. 249.

cannot be a bar to a suit for the original cause of complaint" (*c*).

So also Story, in his Conflict of Laws (*d*), writes as follows on the distinction between foreign and domestic judgments. "But there is still a very essential and important distinction between the two. Domestic judgments rest upon the conclusive effect of the record, which is absolutely unimpeachable. Foreign judgments are mere matters *en pais*, to be proved the same as an arbitration and award, or an account stated: to be established as matter of fact before the jury: and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof."

Neither does the foreign judgment create a merger of the original debt (in England) (*e*). For it does not entitle the plaintiff in whose favour it is given to immediate execution here. "The ground on which a plea of judgment recovered bars the plaintiff from any further action, is that the original nature of the debt, or damage where it may be sought to be recovered, is changed: that he has a higher remedy; he has a

(*c*) *i.e.*, if in favour of plaintiff. See per Bosanquet, J., in *Smith* v. *Nicolls*, 5 Bing. N. C. at p. 223; and see per Lord Ellenborough in *Hall* v. *Odber*, 11 East, 124.

(*d*) 7th ed., § 618 *i*.

(*e*) Per Bailey, J., in *Hall* v. *Odber*, 11 East, at p. 126; and see *Bank of Australasia* v. *Harding*, 9 C. B. 661; *Bank of Australasia* v. *Nias*, 20 L. J. Q. B. 284; *Kelsall* v. *Marshall*, 1 C. B. N. S. 241; *Castrique* v. *Behrens*, 30 L. J. Q. B. 163. But see Story, Conflict of Laws (7th ed.), § 618 *h*, commenting on *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; and see also *Ellis* v. *McHenry*, L. R. 6 C. P. 228.

judgment of a court of record, on which he can issue an immediate execution: and, inasmuch as an immediate execution could be issued on his judgment, it would be a very superfluous matter, and give great encouragement to litigation, if he were allowed to commence *de novo*, and bring another action on that which was the original ground of complaint. Therefore, it has been always held, that, whether in an action of debt or for damages, the cause of action has itself merged and become extinguished in a remedy of a higher nature, where there is a judgment obtained in a court of record in this country. . . . But the judgment of a colonial or foreign court cannot be enforced by immediate execution in this country, but, in order to enforce it in this country, a new action must be brought here, in which such colonial or foreign judgment forms evidence of a contract between the parties" (*f*).

It follows, therefore, that a plaintiff who has obtained a foreign judgment in his favour, may nevertheless bring an action in England on the original cause of action (*g*), and the plaintiff in England is then entitled to use the foreign judgment in his favour as *primâ facie* evidence (*h*), but in order to have a conclusive effect, the judgment must, if there is an opportunity, be pleaded by way of estoppel (*i*). Or the plaintiff may bring an action in

(*f*) Per Tindal, C. J., in *Smith* v. *Nicolls*, 5 Bing. N. C. at pp. 220, 221.

(*g*) *Hall* v. *Odber*, 11 East, 124; *Smith* v. *Nicolls*, 5 Bing. N. C. 208; *a fortiori*, if the judgment were obtained by default in a colonial court which was not a court of record; and see Story, Conflict of Laws (7th ed.), § 599 *a*.

(*h*) *Hall* v. *Odber*, 11 East. 124.

(*i*) See the judgments in *Doe* v. *Huddart*, 2 C. M. & R. 316;

England on the foreign judgment itself (*k*). And he may do so whether the foreign court in which the judgment was obtained, is a court of record or not (*l*).

A foreign judgment may also be set up as a defence to an action in England for the same cause of action (*m*). But there has been considerable difference of opinion as to the distinction between the cases, where an action is brought on a foreign judgment, and where a foreign judgment is pleaded in bar to an action. Thus, in *Philips* v. *Hunter* (*n*), Eyre, C. J., who came to a different conclusion from the majority of the court, but whose judgment has often been since cited as an important authority, said, "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent

and *Vooght* v. *Winch*, 2 B. & Ald. 662; and see *post*, p. 400.

(*k*) *Walker* v. *Witter*, 1 Dougl. 1; see also *Crawford* v. *Whittal*, 1 Dougl. 4, note; and *Thompson* v. *Blackhurst*, 1 N. & M. at p. 273; and per Tindal, C. J., in *Smith* v. *Nicolls*, 5 Bing. N. C. at pp. 220, 221.

(*l*) See Lord Brougham's judgment in *Houlditch* v. *Donegal*, 2 Cl. & Fin. 177. But see Blackburn, J.'s comments on this case in *Godard* v. *Gray*, L. R. 6 Q. B. 139; and his judgment in *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155; per Parke, B., in *Williams* v. *Jones*, 13 M. & W. 628.

(*m*) *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; *Barber* v. *Lamb*, 8 C. B. N. S. 95.

(*n*) 2 H. Bl. at p. 410; see also *Houlditch* v. *Donegal*, 2 Cl. & Fin. 477; *Bank of Australasia* v. *Harding*, 19 L. J. C. P. 345; *Reimers* v. *Druce*, 23 Beav. 149.

to which by our law sentences and judgments are obligatory: not as conclusive but as matter *in pais*, as consideration *primâ facie* sufficient to raise a promise: we examine it, as we do all other considerations of promises, and for that purpose we receive evidence what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us."

The above statement of the law has, however, been considerably qualified by more recent authorities, the general effect of which is summarised in Story's Conflict of Laws, as follows: "This subject has been much discussed in England of late, and the well-established present English doctrine is, that a foreign judgment is only *primâ facie* evidence in England, upon the question whether the foreign court had jurisdiction of the subject-matter, or of the person of the defendant, or whether the judgment was regularly (*o*) obtained; but that it is conclusive upon the defendant, so far as to prevent him from alleging that the promises upon which it was founded, were never made, or were obtained by fraud of the plaintiff" (*p*). The arguments in favour of the existence of the above distinction are well stated

(*o*) See also *Don* v. *Lipmann*, 5 Cl. & Fin. 1.

(*p*) See Story, Conflict of Laws, (7th ed.), § 606 *a*, citing, *inter alia*, *Bank of Australasia* v. *Nias*, 20 L. J. Q. B. 284; *Henderson* v. *Henderson*, 6 Q. B. 288; *Reimers* v. *Druce*, 23 Beav. 149; *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301; *Vanquelin* v. *Bouard*, 15 C. B. N. S. 341; *Scott* v. *Pilkington*, 2 B. & S. 11; *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368.

in the same authority, as follows (*q*): "In the next place, as to judgments *in personam*. And here a distinction is commonly taken between suits brought by a party to enforce a foreign judgment, and suits brought against a party who sets up a foreign judgment in bar of the suit by way of defence. In the former case it is often urged that no sovereign is bound *jure gentium* to execute any foreign judgment within his dominions: and therefore, if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it, if upon such examination it should appear unjust and unfounded. He acts in executing it upon the principles of comity (*r*): and has therefore the right to prescribe the terms and limits of that comity. But it is otherwise, it is said, where the defendant sets up a foreign judgment as a bar to proceedings; for if it has been pronounced by a competent tribunal and carried into effect, the losing party has no right to institute a new suit elsewhere, and thus to bring the matter again into controversy: and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right: and the *exceptio rei judicatæ* under such circumstances is entitled to universal conclusiveness and respect.

(*q*) 7th ed., § 598, p. 745; citing, *inter alia*, *Burrows* v. *Jemino*, 2 Str. 733, and Appendix B, p. 415; *Boucher* v. *Lawson*, Cases temp. Hardwicke, 80; *Tarleton* v. *Tarleton*, 4 M. & S. 20; and per M. R. in *Reimers* v. *Druce*, 23 Beav. 149.

(*r*) *Robinson* v. *Bland*, 2 Burr. 1077; and Lord Ellenborough's remarks in *Power* v. *Whitmore*, 4 M. & S. 150.

This distinction has been very frequently recognized as having a just foundation in international justice."

The distinction of course depends almost entirely upon what principle is adopted in enforcing or recognizing foreign judgments in England (*s*). But whatever difference of opinion may exist as to this principle, there are certain recognized propositions as to the conclusiveness of foreign judgments, upon which the cases are, with some exceptions, agreed.

1. *The English courts will not reckon as conclusive a judgment of a foreign court which was* (α) *not final and conclusive where pronounced, or* (β) *not a decision on the merits.*—(α.) A judgment for defendant in a colonial court of record was pleaded by way of estoppel, to a subsequent action in England between the same parties; held that the plea was bad, as it did not appear that the colonial judgment was final and conclusive in the colony itself, so as to bar the plaintiff from another action there (*t*).

Plaintiff brought assumpsit on a decree of the High Court of Chancery in the island of Jamaica, whereby defendant was ordered to pay a certain sum to plaintiff on a certain day, first deducting thereout defendant's costs, to be taxed by the proper officer; held that the sum to be deducted not being ascertained, the amount was

(*s*) See *post*, p. 151. The authorities on this point up to the time of *Houldditch* v. *Donegal*, 2 Cl. & Fin. 477, are collected in a note at the end of that case.

(*t*) *Plummer* v. *Woodburne*, 4 B. & C. 625; and see *Paul* v. *Roy*, 15 Beav. 433; *Frayes* v. *Worms*, 10 C. B. N. S. 149; *Ellis* v. *McHenry*, L. R. 6 C. P. 228, at p. 234.

uncertain, and the decree could not therefore be the foundation of an assumpsit (*u*).

(β.) Cross actions for collision were brought in England by the owners of two vessels, the owners of one vessel having already obtained judgment by default, in a foreign court, against the owners of the other. The Court in this country, having decided on the merits in favour of the owner who had made default in the foreign action, refused to give effect to the foreign judgment, on the plea of *res judicata* (*x*). "The second reason," said Sir R. Phillimore, "is that the foreign judgment, not having been given on the merits of the case, but on matters of form only, cannot be set up as a bar to a decision on the merits."

2. *The English courts will not recognise as conclusive a judgment of a foreign court*, (α) *which had not competent jurisdiction*, *or* (β) *where the procedure was irregular*, *or the judgment improperly obtained*, *or* (γ) *which was contrary to natural justice*.—(α.) As to the question of jurisdiction. The foreign court may have no jurisdiction either over the cause which it professed to determine, or over the subject-matter, or over the parties, and want of jurisdiction may be shown by extrinsic evidence (*y*).

(*u*) *Sadler* v. *Robins*, 1 Camp. 253; see also *Newland* v. *Horsman*, 2 Ch. Cas. 74; *Obicini* v. *Bligh*, 8 Bing. 335; *Callandar* v. *Dittrich*, 4 M. & G. 82; *Behrens* v. *Sieveking*, 2 My. & Cr. 602; *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368. And, on the same principle, no action can be brought on an interlocutory order of an inferior court. See *Emerson* v. *Lashley*, 2 H. Bl. 248; *Fry* v. *Malcolm*, 4 Taunt. 705; and *ante*, p. 26.

(*x*) *The Delta*, L. R. 1 P. D. 393.

(*y*) See the judgment of Sir

Thus, where a judgment had been obtained, in the island of Tobago, against a person stated on the face of the proceedings to be "formerly of the city of Dunkirk, and now of the city of London, merchant," and who was cited to appear at the ensuing court to answer the plaintiff's action by a summons, which was returned served "by nailing up a copy of the declaration at the court-house door," and on which service judgment was afterwards given against defendant by default; it was held, that no action could be maintained in England upon a judgment so obtained (*z*). This case was commented upon, and explained by Blackburn, J., in the case of *Schibsby* v. *Westenholz* (*a*), to the following effect, namely, that it must be determined whether the defendant in the particular (foreign) suit was such a person as to be bound by the judgment which it is sought to enforce. That if the defendant was a subject of the foreign country, or resident there at the institution of the suit, or even when the obligation was contracted, he would be liable; or that if a plaintiff selected a foreign tribunal to sue, its judgment would be binding on him (*b*).

Wm. Scott in *The Flad Oyen*, 1 Robinson's Adm. Rep. 135; cited in *Donaldson* v. *Thompson*, 1 Camp. 433 note; and in *Havelock* v. *Rockwood*, 8 T. R. 268. See also *Bowles* v. *Orr*, 1 Y. & Coll. 464; the judgment of the M. R. in *Reimers* v. *Druce*, 23 Beav. 145; *Cavan* v. *Stewart*, 1 Stark. 525; and Story's Conflict of Laws (7th ed.), § 586. On the question whether, if the extrinsic evidence necessary to show want of jurisdiction, contradicted the foreign judgment, it would be admissible, see Smith's L. C. (8th ed.), vol. ii. p. 843.

(*z*) *Buchanan* v. *Rucker*, 1 Camp. 63.

(*a*) *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155. See also per Blackburn, J., in *Godard* v. *Gray*, L. R. 6 Q. B. at pp. 148, 151 *et seq.*; and in *Castrique* v. *Imrie*, L. R. 4 H. L. at p. 435.

(*b*) *General Steam Navigation*

The learned judge then says, "We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *De Cosse Brissac* v. *Rathbone* (*c*) is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound." But whether the mere fact of holding property in the foreign country where the judgment is pronounced is sufficient to give the court jurisdiction, is a question which was not decided (*d*).

The following case (*e*) throws some light upon what amounts to a voluntary submission, on defendant's part, to the jurisdiction of the foreign court. Defendant was the holder of shares in a foreign company, having its legal domicil in that foreign country; and, by the laws of that country, he was bound by the articles of association of the company. It was provided (*inter alia*) by the articles of association, that all disputes arising, during any liquidation, between the shareholders, should be submitted to the jurisdiction of the foreign court: that every shareholder provoking a contest should elect a domicil, and in default of his

Co. v. *Guillou*, 11 M. & W. 877; but see *Simpson* v. *Fogo*, 29 L. J. Ch. 657; 32 L. J. Ch. 249.

(*c*) 30 L. J. Ex. 238.

(*d*) See *Becquet* v. *McCarthy*, 2 B. & Ad. 951; *Douglas* v. *Forrest*, 4 Bing. at p. 703; *L. & N. W. Rail. Co.* v. *Lindsay*, 3 Macq. 99; and see per Fry, J., in *Rousillon* v. *Rousillon*, L. R. 14 Ch. D. 351, at p. 371.

(*e*) *Copin* v. *Adamson*, L. R. 9 Ex. 345; L. R. 1 Ex. D. 17. See also *Novelli* v. *Rossi*, 2 B. & Ad. 757.

so doing, that a domicil should be elected for him, and that all summonses, &c., served at such elected domicil, should be considered as validly served. The company went into liquidation. Defendant provoked a contest. He did not elect a domicil, and consequently one was elected for him, and he was served with a summons at the elected domicil. He did not appear, and judgment was given against him by default. Held (*f*), that defendant, by becoming a shareholder in the foreign company, and agreeing to its articles of association, had agreed to submit himself to the jurisdiction of the foreign court, in matters provided for in the said articles of association.

The circumstances necessary to give a foreign court jurisdiction have been stated shortly, in a recent case (*g*), by Fry, J., as follows:—"The courts of this country consider the defendant bound, where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant, in the character of plaintiff, has selected the forum in which he is afterwards sued; where he has voluntarily appeared (*h*); where he has contracted to submit himself to the forum in which the judgment was obtained, and, possibly, if *Becquet* v. *MacCarthy* (*i*) be right, where the defendant has real estate within the foreign

(*f*) On the authority of *Bank of Australasia* v. *Harding*, 19 L. J. C. P. 345; *Bank of Australasia* v. *Nias*, 20 L. J. Q. B. 284; and *Vallée* v. *Dumergue*, 18 L. J. Ex. 398.

(*g*) *Rousillon* v. *Rousillon*, L. R. 14 Ch. D. 351, at p. 371.

(*h*) Even where he was a resident in England at the time. See *Russell* v. *Smythe*, 9 M. & W. 819.

(*i*) 2 B. & Ad. 951.

jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."

(β.) There are also cases where, although the foreign court had originally the jurisdiction which it assumed, the proceedings may be shown to be irregular in themselves. For instance, a party who has never been resident within the jurisdiction of a foreign court, will not be bound by a judgment obtained against him there, unless it appears that he was summoned to attend the proceedings (*k*).

So also proceedings in attachment issuing from the Tolzey court at Bristol (for this purpose a foreign court), were not enforced by the Court of Common Pleas, as it appeared on the face of the record that the proceedings had not been prefaced by a summons, and a return of *non est inventus* (*l*).

Similarly in an action brought in England on an Irish judgment (*m*), it was held that the action was not maintainable, as it appeared that the defendant had never had notice of the proceedings, or had been before the Court. Lord Denman, in this case said, "It is sought to put an Irish judgment *in personam*, on the same footing precisely as the judgment of an English superior court: but, although a record for certain purposes, the inquiry is still open, not indeed into the merits of the action or the propriety of the decision, but

(*k*) *Cavan* v. *Stewart*, 1 Stark. 525. But, as to costs of subsequent proceedings in England, see *Griffin* v. *Brady*, 39 L. J. Ch. 136.

(*l*) *Bruce* v. *Waite*, 1 M. & G. 1; *Ward* v. *Ellayn*, Cro. Jac. 261.

(*m*) *Ferguson* v. *Mahon*, 11 A. & E. 179. But see *contra*, *Reynolds* v. *Fenton*, 8 C. B. 187; Smith's L. C. (8th ed.), vol. ii. pp. 844, 845.

whether the judgment passed under such circumstances as to shew that the court had properly jurisdiction over the party" (*n*).

It must, however, be observed, that personal service of the summons may be dispensed with by the laws of the foreign country in which the foreign judgment was obtained (*o*). Thus, the necessity for notice to Defendant may be dispensed with by statute (*p*), or by the general law of the foreign country in which the foreign judgment was obtained (*q*); and a statement on the face of the proceedings is *primâ facie* evidence that all the proper formalities have been observed (*r*).

(γ.) With regard to the principle on which those decisions, in which the judgment of a foreign court has been held to be contrary to natural justice, are founded, there is considerable difference of judicial opinion. Thus, it has been stated on high authority (*s*), that the principle of want of jurisdiction will be found to lie at the bottom of those cases in which our Courts have refused to enforce judgments obtained in a foreign

(*n*) See also *Frankland* v. *McGusty*, 1 Knapp. 274; and as to Irish judgments, see *Guinness* v. *Carroll*, 1 B. & Ad. 463.

(*o*) *Sheehy* v. *Professional Life Assurance Co.*, 13 C. B. 787; 2 C. B. N. S. 241; 3 C. B. N. S. 597.

(*p*) *Cowan* v. *Braidwood*, 1 M. & G. 882.

(*q*) *Vallée* v. *Dumergue*, 4 Ex. 290; *Meus* v. *Thellusson*, 8 Ex. 638.

(*r*) *Molony* v. *Gibbons*, 2 Camp. 502; *Cowan* v. *Braidwood*, 1 M. & G. 882. The presumption is, "omnia rite esse acta;" *Arnott* v. *Redfern*, 3 Bing. 353; *Taylor* v. *Ford*, 29 L. T. 392.

(*s*) Per Lord Blackburn in *Castrique* v. *Imrie*, L. R. 4 H. L. at p. 435. See also his comments in the same case on Story's Conflict of Laws, § 592.

country, against a person not resident in that country, and who had no notice of the suit (*t*).

The phrase "natural justice" does not indeed seem to have received a strict judicial interpretation, but it has been used by many eminent judges, and in important cases arising on foreign judgments. Thus, in *Messina* v. *Petrococchino* (*u*) Sir Robert Phillimore, delivering the judgment of the court, says:—"A foreign judgment of a competent Court may indeed be impeached, if it carries on the face of it a manifest error, if it is shown to have been obtained by fraud, or to be wanting in the conditions of natural justice." So too, in *Castrique* v. *Imrie* (*x*), Lord Chelmsford says, "It is admitted that if the judgment of the Court of Havre was a judgment *in rem*, the plaintiff cannot recover in this action unless he can impeach the judgment on the ground of fraud, or as being contrary to natural justice." And, in the same case, Lord Hatherley uses the expression "contrary to justice," but apparently in reference to irregularity of procedure rather than to the substance of the judgment. His lordship, when Vice-Chancellor, draws a similar distinction in his judgment in *The Liverpool*

(*t*) Such as *Buchanan* v. *Rucker*, 1 Camp. 63. In *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. 295, 298, Lord Coleridge says, "In *Buchanan* v. *Rucker*, Lord Ellenborough, C. J., seems to have been of opinion that a foreign judgment obtained without giving to the defendant notice of the proceedings, could not be enforced, it being against natural justice; but this view does not appear to have been approved of by the present Lord Blackburn in *Schibsby* v. *Westenholz*, L. R. 6 Q. B. 155, at p. 160."

(*u*) L. R. 4 P. C. 144; see also per Lord Ellenborough in *Power* v. *Whitmore*, 4 M. & S. 150.

(*x*) L. R. 4 H. L. 414, at p. 446.

Marine Insurance Co. v. *Hunter* (*y*), where he says: "The conclusion at which I arrived in *Simpson* v. *Fogo* (*z*) was simply this: It is undoubtedly part of the law of nations, as was stated by Lord Eldon in *Wright* v. *Simpson* (*a*), to recognize the judgments and the procedure of the tribunals of all nations administering justice among their subjects, pursuant to natural justice and equity. But if, in examining a judgment as we are at liberty to do, we find on the face of it, as appeared to Lord Loughborough in *Talleyrand* v. *Boulanger* (*b*), and as appeared in several other instances which have been referred to at common law (*c*), that a course of procedure has been adopted which is inconsistent with natural justice, then the court will not give effect to the decision, and to the authority which it would otherwise be perfectly willing to recognize. It sometimes happens, for instance, that foreign Courts proceed to judgment in the absence of the party against whom the proceedings are taken, or after inadequate notice of trial (*d*)." And in the same case, on appeal, Lord Chelmsford says, with reference to the term "natural justice:" "It was argued that the law of Louisiana, which refuses to recognize transfers of property in chattels without delivery of possession, was so contrary to natural justice that it was entitled to no respect in this

(*y*) L. R. 4 Eq. 62; and L. R. 3 Ch. App. 479.

(*z*) 29 L. J. Ch. 657; 32 L. J. Ch. 249.

(*a*) 6 Ves. 714, 730.

(*b*) 3 Ves. 447.

(*c*) See *Bushby* v. *Munday*, 5 Madd. 297; *Lord Portarlington* v. *Soulby*, 3 My. & K. 104; *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416, at p. 139; *Hope* v. *Carnegie*, L. R. 1 Ch. App. 320.

(*d*) *Simpson* v. *Fogo*, however, can hardly be considered to belong to this class of cases.

court. . . . It is the application of the law to foreigners, and the refusal to recognize their title to chattels—a title which is valid and complete in their own country—unless the property is accompanied with possession, which renders, not the law itself, but the decisions of the Courts of Louisiana upon it open to the reproach of injustice. . . It was therefore the application of the peculiar law of Louisiana to a case which, by the comity of nations, ought to have been excluded from its operation, which makes the decision of Vice-Chancellor Wood in *Simpson* v. *Fogo* (*e*) quite correct, and to be reconciled with his judgment in the present case."

And, as to the term natural justice being specially applicable to the form of procedure, Bramwell B., in another case (*f*), says, "I think the term natural justice, which has been used in reference to foreign judgments, refers rather to the form of procedure than to the merits of the particular case. If this were the case of a judgment obtained by reason of untrue statements contained in an affidavit in a foreign court where the procedure is contrary to natural justice, then we might refuse to give effect to that judgment; but if the procedure be not contrary to natural justice, the defendant has a remedy by an application to the foreign court to get the proceedings set aside: so that in all cases there will be a remedy. If the proceedings be in accordance with the practice of the foreign court, but

(*e*) 29 L. J. Ch. 657; 32 L. J. Ch. 249. But see Lord Blackburn's comments on this case in *Castrique* v. *Imrie*, L. R. 4 H. L. 414.

(*f*) *Crawley* v. *Isaacs*, 16 L. T. N. S. 529, at p. 531.

that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them, but, on the other hand, if the procedure be in accordance with natural justice, the foreign court itself will interfere to prevent the Plaintiff taking advantage of the judgment improperly obtained. Of course, in the case of the procedure being contrary to natural justice, it would be useless to go to the foreign court and complain of its being so."

3. *The English Courts will not recognise as conclusive the judgment of a foreign court, which has been fraudulently obtained* (*g*).—And, if an action is brought in England on a foreign judgment, a plea of fraud is a good defence thereto (*h*).

But the fraud must have been on the part of one of the actual parties to the foreign action in which the judgment was obtained (*i*).

And the fraud must have been committed before the Court itself at the trial of the action. Fraud committed previously to the case being brought to a hearing before the Court, is not sufficient (*k*).

The authorities, however, in the case of foreign judg-

(*g*) *Bowles* v. *Orr*, 1 Y. & C. Exchcq. in Eq. 464; *Price* v. *Dewhurst*, 8 Sim. 279; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Reimers* v. *Druce*, 23 Beav. 145; *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695; *Messina* v. *Petrococchino*, L. R. 4 P. C. 144; *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. (C. A.) 295.

(*h*) *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695.

(*i*) *Crawley* v. *Isaacs*, 16 L. T. N. S. 529; *Flower* v. *Lloyd*, L. R. 10 Ch. D. 327, as explained in *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. (C. A.) 295, at pp. 298, 308.

(*k*) *Flower* v. *Lloyd*, L. R. 10 Ch. D. 327, as explained in *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. (C. A.) 295, at p. 308.

ments *in rem*, do not appear to be quite so consistent. But the Court of Chancery seems to have disregarded even a foreign judgment *in rem*, on the ground of fraud. Thus, in the case of *Price* v. *Dewhurst* (*l*), where probate of a will had been obtained in a foreign court, Shadwell, V.-C. said, "This, I apprehend, I am at liberty to do, namely, to see whether a judgment obtained abroad has been fraudulently obtained or not; and I apprehend that, if the court finds that certain proceedings abroad have been fraudulent, then it is at liberty to deal with the parties it finds before it, and the subject it has to administer, just in the same manner as if the foreign judgment had never taken place." And further on in his judgment (at p. 304), after citing an unreported case of *Blake* v. *Smith*, in which the Court of Chancery had set aside a foreign judgment, on the ground of fraud, he said, "Now I take that to be quite consistent with the principles on which this Court acts; and it is of no consequence where the judgment is given if it appears to have been obtained by fraud; in every such case the Court will consider it as a nullity."

But in *Castrique* v. *Behrens* (*m*), which was an action in the Queen's Bench, and in which the declaration alleged that the captain of an English ship, while on a voyage, drew a bill of exchange on the then owners for the necessary disbursements of the ship, and the bill was dishonoured at maturity; that Plaintiff had in the mean-

(*l*) 8 Sim. 279, at p. 302; cited approvingly by Lord Selborne in *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695.

(*m*) 30 L. J. Q. B. 163; a case which arose out of *Castrique* v. *Imrie*, 8 C. B. N. S. 1; 8 C. B. N. S. 405; L. R. 4 H. L. 414.

time, become mortgagee of the ship; that, by the French law, the *bonâ fide* holder for value of such a bill, if a French subject, could take proceedings *in rem* in the French courts, and attach and sell the ship in a French port, in order to pay the bill; that Defendants being English subjects and the holders of the bill after it had been dishonoured, conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was a *bonâ fide* holder for value; that this was accordingly done, and an order was thereby obtained from the French court, that the ship should be attached and sold in a French port; and that Plaintiff was thus deprived of his property in the ship; it was held that the declaration was bad, as an action could not be maintained, whilst the judgment *in rem*, though in a foreign court and obtained as alleged, remained unreversed. Crompton, J., in delivering the judgment of the Court (himself, Wightman and Blackburn, JJ.), said: "It is averred, and we must on the demurrer assume that it is truly averred, that by the law of France the judgment *in rem* can only be obtained, if the holder of the bill of exchange be a French subject, and *bonâ fide* holds for value; and we must take it as admitted on this demurrer that Troteaux, the French holder of the bill of exchange, by the fraudulent procurement of the defendants, falsely represented to the French courts that he was holder for value when he was not. It is not necessary to say what would be the effect, if it were stated that, by the contrivance of the defendants, the proceedings were such

that the Plaintiff had no opportunity to appear in the French court, and dispute the allegations. In the present case it is quite consistent with the averments in the declaration, that the Plaintiff had notice of the proceedings in France, and purposely allowed judgment to go by default, or even that he appeared in the French court, intervened, and was heard, and that the very question whether Troteaux was a holder for value, was then decided against him. We think, on the principle laid down in *Bank of Australasia* v. *Nias* (*n*), that the Plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed, this action cannot be maintained."

On the other hand where, to an action in England claiming the value of certain goods and brought upon a foreign judgment *in personam* (confirmed on appeal), whereby Defendants had been ordered to return the goods to Plaintiff or to pay her their value, it was pleaded in defence that the judgments of the foreign court had been obtained by the fraud of Plaintiff, and her husband acting in collusion with her, in fraudulently representing to the foreign courts that the goods in question were not in the possession of Plaintiff and her husband, and in fraudulently concealing from the foreign court, that the goods were in the actual possession of Plaintiff and concealed by Plaintiff and her husband; held on demurrer (affirming the Queen's Bench Division) that the foreign judgment, having been obtained by the fraud of a party to the suits in the foreign courts, could

(*n*) 20 L. J. Q. B. 284.

not be afterwards enforced by such party in an action brought in an English Court and that the defence was a good one; even although the question whether the fraud had been perpetrated, was investigated in the foreign court, and it was there decided that the fraud had not been committed (*o*). Lord Coleridge in his judgment in the above case said, (at p. 299); "It has been argued that the defence is bad, mainly on the ground that upon these pleadings it must be taken that these allegations of fraud were brought before the courts at Tiflis; that the Defendants did state to those courts that the goods were not in their possession, but in the Plaintiff's; that the courts had jurisdiction to examine this defence, and did examine it, and came to a conclusion against the Defendants; and therefore that, whether this conclusion was right or wrong on the matters of fact, the question of the Plaintiff's alleged fraud cannot now be tried or litigated in the courts of this country. Many authorities, from the *Duchess of Kingston's case* (*p*) down to our own time, have been cited during the argument, but not one of them throws a doubt on the broad proposition that where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country, when he seeks to enforce the judgment so obtained. The justice of that proposition is obvious; if it were not so, we should have to disregard a well-established rule of law that no

(*o*) *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. (C. A.) 295.

(*p*) Smith's L. C. (8th ed.), vol. ii., p. 784; *post*, Appendix B.

man shall take advantage of his own wrong, and we should have to lay down as a legal proposition that where a judgment has been obtained in the courts of a foreign country by a fraud and by a wrongful act, nevertheless the person obtaining it can take advantage of that fraud and of that wrongful act, and in the courts of this country can enforce the judgment so obtained." And, further on in his judgment, he said (at p. 302), "It has been suggested that there ought to be some limitation as to the rule, that the obligation arising on the judgment of a foreign court can be annulled by the defence that the foreign court has been misled and not mistaken, if under any circumstances the fraud could have been brought under the notice of the foreign court. I do not think that the general proposition, broad as it is, is to be subjected to any limitation of that kind; and I am of opinion that the fraud of the person who has obtained the foreign judgment, is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country, because the facts necessary to be proved in the English courts were suppressed in the foreign court by the fraud on the part of the person who seeks to enforce the judgment, which the foreign court was by that person misled so as to pronounce. Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a court, it seems to me fallacious to say, that because the foreign court believes what at the moment it has no means of knowing to be false, the court is mistaken and not misled; it is plain that if it had been proved before the foreign court that fraud had been perpetrated with

the view of obtaining its decision, the judgment would have been different from what it was" (*q*).

The difficulty which seems to be involved in the foregoing decision, is, that although the foreign court may have investigated the defence of fraud when set up, and although it may have given a decision on that point, our courts will nevertheless entertain the same point over again. Putting aside any considerations that might arise from the difference between foreign judgments *in rem* and *in personam*, or from the fact of one of the parties to the action being himself involved in the commission of the fraud (*r*), it seems difficult to reconcile this decision with the judgment in *Castrique* v. *Behrens* (*s*).

4. *The judgment of a foreign court is conclusive on the merits* (*t*).—For this proposition, which is of course subject to the general limitation that if it be a foreign judgment *in personam*, it is only conclusive on the parties to it, and those who claim through them, there is the authority of the *Bank of Australasia* v. *Nias* (*u*), the *Bank of Australasia* v. *Harding* (*x*), and *De Cosse Brissac* v. *Rathbone* (*y*), all of which are cited with

(*q*) No reference appears to have been made, either in the above case, or in the case of *Ochsenbein* v. *Papelier*, L. R. 8 Ch. App. 695 (*ante*, p. 134), to the case above mentioned, of *Castrique* v. *Behrens*, 30 L. J. Q. B. 163; *ante*, p. 134.

(*r*) As to this see *Shedden* v. *Patrick*, 1 Macq. 535; and *Cammell* v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728.

(*s*) 30 L. J. Q. B. 163; *ante*, p. 134.

(*t*) The authorities on this point, up to the time of *Houldditch* v. *Donegal*, 2 Cl. & Fin. 477, are collected at the end of that case.

(*u*) 20 L. J. Q. B. 284.

(*x*) 19 L. J. C. P. 345.

(*y*) 30 L. J. Ex. 238.

approval by Blackburn J., in *Godard* v. *Gray* (*z*), and have since been frequently recognised and followed. At one time, however, this was not regarded as a settled point (*a*).

5. *The judgment of a foreign court cannot be impeached on the ground that it has mistaken the law of some other country including that of England.*—Although there is ample authority for this proposition (*b*), there seems to be some difference of opinion as to the conclusiveness of the foreign judgment, where there is error apparent on the face of it.

Thus a foreign judgment *in personam* has been held to be examinable, *inter alia*, for error on the face of it, sufficient to show that the Court had come to an erroneous conclusion either of law or fact (*c*). So also Wood, V.-C. in *Simpson* v. *Fogo* (*d*), said:—"It is now quite settled that a decision *inter partes* by a foreign court, is conlusive upon the merits of the matter in controversy, between the parties and those claiming under them, in any other country, subject

(*z*) L. R. 6 Q. B. 139, p. 150. See also *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; *Kelsall* v. *Marshall*, 1 C. B. N. S. 241; *Barber* v. *Lamb*, 8 C. B. N. S. 95; *Henderson* v. *Henderson*, 6 Q. B. 288; 11 Q. B. 1015; *Vanquelin* v. *Bouard*, 15 C. B. N. S. 341; *Scott* v. *Pilkington*, *Munroe* v. *Pilkington*, 31 L. J. Q. B. 481; *Ellis* v. *McHenry*, L. R. 6, C. P. 228; and see per Sir R. Phillimore in the *Delta*, L. R. 1 P. D. 393, at p. 404.

(*a*) See Smith's L. C. (8th ed.) vol. ii., p. 847 *et seq.*, where the authorities for and against the above proposition are collected.

(*b*) See per Blackburn and Mellor, JJ., in *Godard* v. *Gray*, L. R. 6 Q. B. 139, at p. 150, and cases there cited.

(*c*) *Reimers* v. *Druce*, 23 Beav. 145; *Dent* v. *Smith*, L. R. 4 Q. B. 414.

(*d*) 29 L. J. Ch. 657; 32 L. J. Ch. 249.

only to the question how far you may examine the judgment for error appearing on the face of it" (*e*). And, similarly, Hannen, J., in *Godard* v. *Gray* (*f*), stated, that he did not think that any authority bound them, nor was he prepared to decide that a Defendant, not guilty of any laches, against whom a foreign judgment *in personam* had been given, was precluded from impeaching it on the ground that it appeared on the face of the proceedings to be based on an incorrect view of the English law, even though there might be no evidence that the foreign court knowingly or perversely refused to recognize that law. And in a more recent case in the Privy Council (*g*), it is laid down, that a foreign judgment of a competent court may be impeached, if it carries on the face of it a manifest error.

It may be noticed that Hannen, J., in the above case appears to limit his decision to the case of a foreign judgment where there is an error of English law apparent on the face of the proceedings; and in the case which he was considering it was not strictly necessary to decide anything beyond this. But the language of the other judges in that case is opposed to any such distinction being drawn in favour of English law, and is in favour of the conclusiveness of foreign judgments, notwithstanding errors apparent on the face of them.

(*e*) See also *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; *De Cosse Brissac* v. *Rathbone*, 30 L. J. Ex. 238.

(*f*) L. R. 6 Q. B. 139.

(*g*) *Messina* v. *Petrococchino*, L. R. 1 P. C. 144; and see per Lord Tenterden in *Becquet* v. *M'Carthy*, 2 B. & Ad. at p. 957; and Story's Conflict of Laws (7th ed.) § 607.

Thus Blackburn, J., says (*h*), "but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the Court much trouble to investigate it. Yet on what other principle can we admit as a defence that there is a mistake of English law apparent on the face of the proceedings, and reject a defence that there is a mistake of Spanish or even Scotch law apparent on the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which the defendant avers he can shew did exist."

In *Meyer* v. *Ralli* (*i*), a further distinction was drawn between the case of a foreign tribunal making a mistake in its own law and in the law of some other country. "There is," says the Court, "this peculiarity in the case, which does not, so far as we are aware, seem to have occurred before, that, upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed." And, after referring to *Castrique* v. *Imrie*(*k*), the judgment proceeds as follows: "But, in that case, in delivering the opinion of the majority of the judges, Blackburn, J., speaking of the judgment as matters of

(*h*) *Godard* v. *Gray*, L. R. 6 Q. B. 139. And see per Keating, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414, at pp. 437—439. Although it was held that this was a judgment *in rem*, Keating, J., held that it could not be impeached for error on the face of it, even if it were only a judgment *in personam*.

(*i*) L. R. 1 C. P. D. 358, at pp. 370, 371. See also *Alivon* v. *Furnival*, 1 C. M. & R. 277; and *Dent* v. *Smith*, L. R. 4 Q. B. 414.

(*k*) L. R. 4 H. L. 414.

French law says (*l*), 'We must (at least till the contrary is clearly proved), give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law.' And in the case of *Becquet* v. *M'Carthy* (*m*), Lord Tenterden had said before, 'We ought to see very plainly that the Court has decided against the French law; before we say that their judgment is erroneous on that ground,'—implying that if it clearly appeared, the Court would not give effect to the judgment. Here, the Court expressly professes to proceed on the ground of French law; and although the presumption would be that the Court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the Court has rightly declared it. The contrary,—to use the words of Blackburn, J.—clearly appears, and, either from inadvertence or some other reason, the foreign tribunal (in this case a French Court) has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had, though equally wrong, we might have been bound by *Castrique* v. *Imrie* (*n*) to have given effect to it: but it is a declaration of French law which is wrong. Under these circumstances we are of opinion that there is no rule of comity and no principle on which we are called upon to give effect to such a judgment."

The language of this judgment must, however, be compared with that of Cockburn, C. J., in *Castrique* v.

(*l*) L. R. 4 H. L. 414, at p. 430.
(*m*) 2 B. & Ad. 951, at p. 957; see also *Rousillon* v. *Rousillon*, L. R. 14 Ch. D. 351, at p. 371.
(*n*) L. R. 4 H. L. 414.

Imrie (*o*), which although it deals with a judgment *in rem*, seems to be equally applicable to a judgment *in personam*, as far as regards the parties to it or those claiming under them.

The facts of this case were as follows (*p*): A., a British subject and the owner of a British ship, whilst she was on a voyage transferred her to B. by a bill of sale, and several subsequent transfers were made from mortgagee to mortgagee. The master had, previously to the first transfer, while at Melbourne, drawn a bill for necessary disbursements upon the owner of the ship, which the latter declined to accept, and which was dishonoured at maturity. The ship having in the course of her return voyage touched at Havre, the holder in England of the dishonoured bill, to whom it had been endorsed by the payees at Melbourne, indorsed it to a French firm there, who commenced proceedings in the Tribunal de Commerce of that port against the master and against the ship. The master appeared, but did not defend the suit, and thereupon the Court condemned him "en sa qualité de capitaine et par privilége sur le navire," (an expression which was construed in the Exchequer Chamber and the House of Lords to mean that the ship was condemned also by way of maritime law) to pay the amount of the bill, and declared him free from arrest, to which otherwise he would have been liable. Up to this point the owner and the mortgagees of the ship had not been made parties to the suit, nor

(*o*) See *Imrie* v. *Castrique*, 8 C. B. N. S. 405, at p. 417.

(*p*) This report is taken from Smith's L. C. (8th ed.), vol. ii., pp. 861, *et seq.*

was this necessary by the French law: but afterwards the owner and the first mortgagee were summoned to the civil tribunal of the district in which the Court of Commerce was situated, in order to afford them the opportunity of resisting the judgment directed against the ship. They did not appear, and the original decision of the Court of Commerce was confirmed: and it was ordered that the ship should be sold by public auction. At a later period plaintiff, who was the last mortgagee of the ship, but who had not at that time had the transfer registered to himself, prosecuted a suit before the civil tribunal at Havre, to replevy the ship and release her from custody. In this suit the civil tribunal, misconceiving the law of England, and deeming, erroneously, that by that law no valid transfer could be made of a ship, to the prejudice of creditors, whilst she was on a voyage, unless the sale appeared on the ship's papers, dismissed plaintiff, condemning him in the costs, and upholding the original seizure of the ship. This judgment was affirmed, on appeal to the Court of Appeal at Rouen, which adopted the reasoning on which the judgment of the Havre court was based, although evidence was laid before the court at Rouen as to the real state of the English law. The ship was subsequently sold by auction to defendants. Plaintiffs then brought an action against the defendants in England, to recover the ship. It was held however that the English courts were bound to give effect to the French judgment, and to the title to the ship which the defendants derived through it. Cockburn, C. J., in his judgment in the above case, says (*q*): "The

(*q*) 8 C. B. N. S. at p. 417.

result of the authorities on this subject clearly establishes that a judgment *in rem* of a foreign tribunal, turning on a question of English law, cannot, though erroneous, be questioned by a court in this country, any more than, if turning on the law of the country to which the tribunal belonged, it had been erroneous with reference to the latter."

Again, Lord Hatherley, in his judgment in the House of Lords, says (*r*): "Now, my lords, without expressing any opinion (for I purposely wish to avoid doing so) with reference to a decision of my own which has been cited, in the case of *Simpson* v. *Fogo* (*s*) as to what might be done in the case of a court wilfully determining that it will not, according to the usual comity, recognise the law of other nations when clearly and plainly put before it (*t*), without saying as to what would justify the courts in our own country in hesitating to give effect to a foreign judgment, if obtained by fraud or misrepresentation, it is enough for me to say upon the present occasion, that, in this case, the whole of the facts appear to have been inquired into by the French courts judicially, honestly, and with the intention to arrive at the right conclusion, and, having heard the facts as stated before them, they came to a conclusion which justified them (in France) in deciding as they did decide. That decision confirmed the title by sale to the person who became the purchaser at the sale. According to the law of France, that title could not be thereafter disputed or disturbed, the court at

(*r*) L. R. 4 H. L. at p. 445.

(*s*) 29 L. J. Ch. 657; 32 L. J. Ch. 249.

(*t*) As to this see per Blackburn and Mellor, J. J., in *Godard* v. *Gray*, L. R. 6 Q. B. 139.

Rouen being the highest court having jurisdiction in the matter. That being so, there being neither a case of refusal to attend or listen to anything that might be said to them with reference to our own law, nor to adopt that as the ground of their conclusion, and there being no case, as far as I know, of any fraudulent representation or concealment with reference to any facts in the case, and the decision having been come to and pronounced, not, as in one of the cases which was cited, in the absence of the parties, but in Castrique's own suit, where he had every opportunity of bringing forward his own case, the decision cannot be complained of as one contrary to justice, through its being pronounced in the absence, from want of citation, of any of the parties interested. I therefore think we are bound to give effect to the conclusion arrived at by the French court, and to the title derived through that conclusion."

6. *It seems that the English courts will not recognise as conclusive the judgment of a foreign court when it has been obtained by a British subject and is in express contravention of the English statutory law.*—This appears to be the decision arrived at in the well-known case of *Philips* v. *Hunter* (*u*), but, although the majority of the Court decided against the conclusiveness of the foreign judgment, the current of modern authority seems to be more in accordance with the judgment of Eyre, C. J., who dissented from the other judges.

The statutes which came under the consideration of the Court in *Philips* v. *Hunter* (*x*) were 13 Eliz. c. 7, sec. 2, and 1 Jac. 1, c. 15, sec. 13.

(*u*) 2 H. Bl. 402. (*x*) *Ibid.*

By the 13 Eliz. c. 7 sec. 2, the Lord Chancellor was empowered to appoint, in the case of an insolvency, certain commissioners, who should thereupon have authority to take the debtor's lands and also his goods and chattels wherever they might be found, and to sell the same for the benefit of his creditors. Again, by stat. 1 Jac. 1, c. 15 sec. 13, the commissioners in bankruptcy were empowered to assign debts due to a bankrupt, for the benefit of his creditors, and it was enacted, that, after any such assignment, the bankrupt should not have any property in such debts, and that the same should not be attached as the debts of the bankrupt, according to the custom of London or otherwise.

The facts of the case were as follows:—A., B., and C., being partners in trade in England, A. and B. resided in England, and C. went to a foreign country for the special and temporary purpose of transacting certain business there for the English house, which had no place of business except the one in England. D., a resident in England, contracted a debt in England to the English firm of A., B., and C. D. then became insolvent, and C., knowing that D. had stopped payment, and after a commission of bankruptcy had in fact issued against D. in England, and a provisional assignment of D.'s goods &c. had been made (under Stats. 13 Eliz. c. 7, and 1 Jac. 1, c. 15, before mentioned), attached in the name of himself and his partners, by legal process, a debt due to D. in the foreign country in which C. then was, and obtained payment of it under the judgment of a court of justice in that country. It was decided by the majority of the Court (six judges, including Lord C. B. Macdonald),

dissentiente C. J. Eyre, that D.'s assignees had a right to recover back the money so obtained by C., in an action against A., B., and C., for money had and received to their use (*y*).

Possibly the majority may have considered that the case in question lay outside the province of estoppel altogether, and that there were other considerations involved, which prevented the application of the doctrine, or which altogether outweighed it. Or the decision of the majority might be supported on the ground that there was a kind of estoppel arising out of the Acts of Parliament above-mentioned, by which Acts C. as a British subject would be bound, and that this would counteract any estoppel that might arise on the foreign judgment, on the well-known principle that an estoppel against an estoppel sets the matter at large. Or again, the decision might be supported on the ground that the foreign judgment had been improperly obtained by C., *i.e.*, improperly in the sense that, knowing what the English law was, he had no business to have obtained the foreign judgment in his favour, to the exclusion of D.'s assignees in bankruptcy. The English court may in effect have said to him: "You knew what the English law was, you were aware of what had taken place, and you knew that according to English law you could not

(*y*) The judgment of the majority depended partly on the wording of the statutes above mentioned. They also relied on *Sill* v. *Worswick*, 1 H. Bl. 665; and *Hunter* v. *Potts*, 4 T. R. 192, distinguishing *Le Chevalier* v. *Lynch*, 1 Dougl. 170; *Cleve* v. *Mills*, Cooke's Bankrupt Laws, vol. i., p. 333; and *Allen* v. *Dundas*, 3 T. R. 125.

obtain a valid title against D.'s assignees. Consequently, if you choose to obtain a foreign judgment in your favour to the exclusion of the assignees, you must not expect to get the benefit of it in England."

Eyre, C. J., on the other hand, in his judgment treated the judgment of the foreign court as conclusive until it was reversed. He said: "If we suppose a British subject to have obtained a legal judgment here in our own courts, in direct opposition to the whole scope and tenor of the bankrupt laws, either for want of proof, or by error of the judge, or in any other manner that can be supposed, may he not lawfully hold that judgment, and pursue it to all its consequences until it is impeached in a due course of law, notwithstanding any moral or political obligation he may be said to be under, not to contravene the bankrupt laws?" And, further on in his judgment (*z*), he said, "Lord Mansfield tried what he could to make of this proposition, that a British subject should not be allowed to contravene the statute law of the land, in one of the strongest cases that can be imagined of wilful contravention, the case of marriage contracted abroad by English subjects, withdrawing themselves from England for the express purpose of contravening the statute law respecting marriages, and he failed altogether" (*a*).

He concluded by resting his judgment on the following grounds, viz.: 1. That the plaintiff's demand,

(*z*) 2 H. Bl. at p. 412.

(*a*) But see *Brook* v. *Brook*, 9 H. L. Cas. 193. See also, under Foreign matrimonial sentences, *post*, p. 164. See, however, the remarks on *Brook* v. *Brook*, in Bishop's Marriage and Divorce (6th ed.), vol. i., § 382.

arising as it did out of a transaction in a foreign state, though it might follow the person, must be judged of according to the laws of that state; and 2. That upon the record there was no means of knowing, and therefore notice could not be taken of, the laws of the foreign state, and therefore the Court could not know that the plaintiffs were entitled to maintain the action. "The conclusion from these two propositions," says the learned judge, "to the particular case of the plaintiffs, appears to me to be irresistible."

However, in the converse case of a foreigner suing here, our courts will not consider what personal incapacity he may be under by the laws of his own country (*d*).

7. *It seems that the English courts will not recognise as conclusive the judgment of a foreign court which is contrary to the comity of nations.*—The principle upon which foreign judgments are enforced in England, has been stated somewhat differently by different authorities (*e*). Thus, Lord Ellenborough, in *Power* v. *Whitmore* (*f*), says: "By the comity which is paid by us to the judgments of other courts abroad of competent jurisdiction, we give a full and binding effect to such judgments, so far as they profess to bind the persons and property immediately before them in

(*d*) *De la Vega* v. *Vianna*, 1 B. & Ad. 284; *Don* v. *Lippmann*, 5 Cl. & Fin. 1; per Lord Chelmsford in *Liverpool Marine Co.* v. *Hunter*, L. R. 3 Ch. App. 479, commenting on *Talleyrand* v. *Boulanger*, 3 Ves. 447. But see *Sottomayor* v. *De Barros*, L. R. 3 P. D. 1: L. R. 5 P. D. 94; *Bloxam* v. *Favre*, L. R. 8 P. D. 101.

(*e*) See per Lord Coleridge in *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D. 295, at p. 300.

(*f*) 4 M. & S. 150.

judgment, and to which their adjudications properly relate."

Again, Lord Westbury, in *Shaw* v. *Gould* (*g*), makes the following observations: "The extent and limits of the comity of nations, or of the obligation which one nation is under to receive and admit the judgments of the courts of another country, are well defined in one of the maxims of Huber as follows: 'Rectores imperiorum id comiter agunt, ut jura cujusque populi, intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur.'"

On the other hand, in *Godard* v. *Gray* (*h*), Blackburn, J., states the principle upon which foreign judgments are enforced in England as follows: "It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France), do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England and those states which are govened by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams* v. *Jones* (*i*): 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay

(*g*) L. R. 3 H. L. at p. 81. As to the difficulty of applying the principle, see per Sir W. Scott in the *Flad Oyen*, 1 Robinson's Adm. Rep. 135.

(*h*) L. R. 6 Q. B. 139.

(*i*) 13 M. & W. at p. 633.

that sum, on which an action of debt, to enforce the judgment, may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. . . . If indeed foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to enquire whether the foreign court had made a mistake, or to allow the defendant to assert that it had, yet that if the foreign court itself admitted its blunder they would not then act: but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not fulfilling it."

The following are authorities in favour of the above proposition. Thus, in the case of *Cammell* v. *Sewell* (*k*) Byles, J., differing from the majority of the Court (in the Exchequer Chamber), thought that the foreign judgment was not binding in this country, on this ground, amongst others, namely, that the law of Norway, on which the foreign judgment was based, was opposed to the general maritime law of the world (*l*), and would not be recognised by the comity of nations (*m*).

(*k*) 5 H. & N. 728. 5 B. & Ald. 617.

(*l*) *Freeman* v. *East India Co.*,

(*m*) *Segredo, otherwise Eliza*

Again, V.-C. Wood, in his judgment in the case of *Simpson* v. *Fogo* (*n*), says: "It has been held in several cases, especially on the subject of prize, that any peculiar legislation of foreign countries which has not been recognised by the world at large, any peculiar legislation of their own with regard to a special subject matter, may destroy the conclusive effect of a judgment, if it appears on the face of the record as the ground of decision. For instance, it has been decided in an action on a policy effected during a war, on the footing of a declaration that the ship was neutral, that where, by the local legislation of some one country not recognised by the other countries of Europe, ships are held to forfeit their neutrality if they contravene particular regulations not acquiesced in by the world in general, the courts of all other countries are entitled to disregard such special regulations, and to treat even a judgment *in rem* as inoperative on the question of neutrality."

There is, however, a difference of judicial opinion, as to how far perverse disregard of English law in a foreign court should cause the foreign judgment to be regarded as in violation of the comity of nations.

Thus, in *Castrique* v. *Imrie* (*o*), Cockburn, C. J., said: "It is not disputed that a judgment *in rem*, obtained without fraud, and pronounced by a competent court, is generally binding upon all the world: but it is contended that in this case an exception should be made to the rule, on the ground that, it being clear that the incidents of the

Cornish, 1 Spinks Eccles. & Adm. Rep. 36; *Wolff* v. *Oxholm*, 6 M. & S. 92.

(*n*) 29 L. J. Ch. 657.

(*o*) See *Imrie* v. *Castrique*, 8 C. B. N. S. 405, at p. 415.

contract entered into by the master, on behalf of his owners, were to be governed by the *lex loci* of the contract (in this instance the law of England), the French court knowingly and intentionally set that law at naught, thereby violating the comity of nations, by virtue of which alone the judgments of the tribunals of one country are respected by those of another. It is unnecessary to pronounce any decision upon the principle of law involved in this argument. It is right to say that if it were, some members of the court are strongly disposed to think that, even if the fact on which the argument turns were made out, it would not afford a reason for questioning the validity of a judgment *in rem*. Others, on the other hand, if it could be shown that, in a case in which the effect of a contract was to be determined by the *lex loci contractûs*, a foreign court perversely insisted on applying its own law, being in conflict with the former, thereby outraging the principle of international comity in a manner amounting in fact to a species of judicial misconduct, are by no means prepared to say that in such a case it would not be the duty of a court in this country to refuse to recognize the binding efficacy of such a judgment, not indeed, by way of reprisal towards the foreign tribunal, but to protect our own fellow-subjects from injustice."

8. *The mere pendency of an action in a foreign tribunal at the date of an action brought in England between the same parties, cannot be set up as a bar to the action in England* (*p*).—And the pendency, in a foreign country, of an appeal against a judgment there obtained, though

(*p*) The *Delta*, L. R. 1 P. D. 393. The same principle is applicable to actions pending in an inferior court. See *Sparry's Case*,

it may afford ground for the equitable intervention of an English court (*q*), to prevent the possible abuse of process of such foreign court, and on proper terms to stay execution in an action brought in England on such foreign judgment, is not a bar to the action itself (*r*).

However, where there is a litigation pending in a foreign court, and instituted there by parties seeking to establish their title to property situated within the jurisdiction of such foreign court, it is contrary to all the rules of the comity of nations, for an English court actively to interfere on behalf of the plaintiffs, bringing an action in an English court to enforce rights respecting such property, and who are or might be parties to the action in the foreign court (*s*). But nevertheless the question whether a court having ample authority to decide the matter brought before it, should await the expected adjudication of another tribunal, having only similar authority, by a stay of proceedings, is merely one for the exercise of judicial discretion (*t*).

Co. Rep., vol. iii., 123; *Dudfield* v. *Warden*, Fitzgibbon, 313. And as to the practice in staying proceedings, see *McHenry* v. *Lewis*, L. R. 21 Ch. D. 202; L. R. 22 Ch. D. 397, and the cases there cited. Some distinction appears to be drawn between the practice applicable in cases *in rem* and *in personam*, per Chitty, J.

(*q*) The *Peshawur*, L. R. 8 P. D. 32.

(*r*) *Scott* v. *Pilkington*, *Munroe* v. *Pilkington*, 4 B. & S. at p. 41.

(*s*) *Norton* v. *Florence Land & Public Works Co.*, L. R. 7 Ch. D. 332.

(*t*) *Phosphate Sewage Co.* v. *Molleson*, L. R. 1 App. Cas. 780.

CHAPTER VI.

FOREIGN JUDGMENTS IN REM.

The distinction between judgments *in rem* and *in personam* has already been adverted to (*a*), but in the case of foreign judgments under which property has been sold, it appears to have been, in many cases, a matter of some difficulty to determine whether such judgments should be regarded as judgments *in rem* or *in personam*. For instance, in *Simpson* v. *Fogo* (*b*), the judgment of the Court of Louisiana was held to be a judgment *in personam*, as it only decreed the sale of the mortgagor's interest in the ship, and was a proceeding analogous to an English *fi. fa.* Now, a sale by a sheriff under a *fi. fa.* (against A.) of a particular chattel, does not prevent B. from setting up a title to the chattel, either against the sheriff or against the purchaser from the sheriff, and therefore it is properly considered to be a proceeding *in personam*, whereas a sale, under an order of a Court of Admiralty, of perishable property in their hands, which has been attached, confers a title against all the world (*c*).

(*a*) *Ante*, p. 75.

(*b*) 29 L. J. Ch. 657; 32 L. J. Ch. 249.

(*c*) See per Blackburn, J., in *Castrique* v. *Imrie*, L. R. 4 H. L. 414, at pp. 427, 428; and per Lord Hatherley, *ibid*, pp. 442, 443.

Again, in *Cammell* v. *Sewell* (*d*), there was a difference of opinion amongst the judges as to whether the sale in Norway was a proceeding *in rem* or *in personam*. The judges of the Court of Exchequer held that it was a proceeding *in rem*. The judges of the Court of Exchequer Chamber, however, held it to be a proceeding *in personam*, as they were not satisfied that the proceeding at the auction was a judicial proceeding, although it appears to have been treated as such by the law of Norway (*e*). On the other hand, in *Castrique* v. *Imrie* (*f*), the sale under an order of the French court, was held to be a proceeding *in rem*. And in the latter case, Blackburn, J., in the course of his judgment in the House of Lords (*g*), made some valuable remarks, in which he points out what are the necessary criteria for determining in cases of this kind, whether the transaction operates *in rem* or *in personam*. After stating the difference that exists between judgments for the sale of property by tribunals which have jurisdiction merely over the rights of the parties, and by tribunals which have jurisdiction to determine, not merely the rights of the parties, but the disposition of the property itself, he says, that to constitute a judgment *in rem* in a case of this kind, it is not essential that there should be an actual adjudication

(*d*) 3 H. & N. 617 ; 5 H. & N. 728.

(*e*) Byles, J., however, in his judgment in the Exchequer Chamber (5 H. & N. 728), pointed out that the sale under the alleged law of Norway may be distinguished from a sale in England (*a*.) of a stranger's goods under a distress for rent, (*b*.) in market overt, as it was an international and not a domestic transaction.

(*f*) L. R. 4 H. L. 414.

(*g*) L. R 4 H. L. 414, at pp. 427, 428.

upon the *status* of the thing. He then cites a passage from Story's Conflict of Laws (*h*), as follows :—

"The same principle (viz. that a judgment *in rem* is conclusive) is applied to all other cases of proceedings *in rem*, against movable property, within the jurisdiction of the Court pronouncing the judgment. Whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture (*i*), or of any of the like nature over which such courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject matter (*res*)." He then says: "We may observe that the words as to an action being *in rem* or *in personam*, and the common statement that the one is binding on third persons, and the other not, are apt to be used by English lawyers without attaching any very definite meaning to those phrases. We apprehend the true principle to be that indicated in the passage from Story. We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the State, under the authority of which the Court sits, and secondly, whether the sovereign authority of that state

(*h*) (7th ed.) § 592.

(*i*) Or by damage by collision. See a paragraph inserted by the last editor of Story, and reference in note thereto.

has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world" (*k*).

An exception to the conclusiveness of foreign judgments, which may be noticed here, arises in the case of foreign criminal proceedings. Thus it has been laid down (*l*) that crimes are in their nature local, and the jurisdiction of crimes is local. And similarly Lord Loughborough, in another case (*m*), says, "The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority; a fugitive who passes hither comes with all his transitory rights; he may recover money held for his use, stock, obligations, and the like; and cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend."

Thus, in a case in Chancery, where defendant, a foreigner sojourning in this country, declined to produce certain documents, on the ground that their production

(*k*) As to the nature and effect of proceedings *in rem*, see also the judgment of Jervis, C. J., in *The Bold Buccleuch*, 7 Moore's P. C. 267; and as to whether the decree of a foreign court, declaring the status of a person, and placing him or her, as an idiot or prodigal, under guardianship, should be treated as a judgment *in rem* or not, see Story's Conflict of Laws (7th ed.), § 594, p. 740, and references there given.

(*l*) Per De Grey, C. J., in *Rafael* v. *Verelst*, 2 Sir W. Bl. at p. 1058.

(*m*) *Folliott* v. *Ogden*, 1 H. Bl. 123, at p. 135; see also Buller, J., in *Ogden* v. *Folliott*, 3 T. R. at pp. 733, 734; per Lord Ellenborough in *Wolff* v. *Oxholm*, 6 M. & S. 99; and *Warrender* v. *Warrender*, 2 Cl. & Fin. 488.

would expose him to criminal proceedings in his own country, the Court nevertheless made the order, on the ground that the English courts had no regard to the penal laws of a foreign country (*n*). And, although a criminal acquittal in a foreign country may be pleaded in bar to a subsequent indictment in England for the same offence (*o*), this is not on the ground of estoppel, but upon a principle applicable solely to the criminal law, that no man should be placed in peril twice for the same offence.

We shall, in this chapter, consider the effect in England of:—

I. Foreign Matrimonial Sentences.
II. Foreign Sentences in Admiralty.
III. Foreign Bankruptcy Proceedings.

I. *Foreign Matrimonial Sentences.*—A foreign sentence adjudicating upon the matrimonial status is a judgment *in rem*, and is binding on all the world, if the court pronouncing the sentence has the proper jurisdiction (*p*). Thus, in an early case (*q*), in which the validity of a marriage in France between minors, one of whom was an English subject, was in question, Lord Hardwicke said, "It has been argued to be valid from being established by the sentence of a court in France, having proper jurisdiction. And it is true, that if so, it is con-

(*n*) *King of the two Sicilies* v. *Willcox*, 1 Sim. N. S. 301.

(*o*) *Hutchinson's Case*, Buller's N. P. p. 245.

(*q*) Story's Conflict of Laws (7th ed.), § 595, p. 749; and see the cases cited in Bishop on Marriage and Divorce (6th ed.), vol. ii., § 754, note.

(*q*) *Roach* v. *Garvan*, 1 Ves. Sen. 157.

clusive, whether in a foreign court or not, from the law of nations in such cases: otherwise the rights of mankind would be very precarious and uncertain. But the question is whether this is a proper sentence, in a proper cause, and between proper parties" (*r*). And in a modern case (*s*) Brett, L. J., in delivering his judgment, said, "A judgment or decree determining what is the status of an individual is a judgment or decree *in rem*. It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognized as binding in all suits and by all parties. Such a judgment, where the jurisdiction of the Court which made it is recognized, is treated as binding and final, not only by all the courts of the same country, but by the courts of all countries."

In dealing with the question of the binding effect of a foreign sentence of divorce, the chief consideration is the domicile, whether original or adopted, of the parties. But in the case of a foreign sentence of nullity of marriage, the English courts will also consider, at all events in the case of English subjects, the validity of the contract, and the place where it was made (*t*).

And though, in the case of foreign subjects married in their own country, the English courts would probably consider a sentence of nullity obtained in that foreign country as conclusively binding upon them; there does

(*r*) See also *Cottington's Case* in a note to *Kennedy* v. *Cassilis*, 2 Swanst. 326.

(*s*) *Niboyet* v. *Niboyet*, L. R. 4 P. D. 1, at p. 12.

(*t*) Brett, L. J., notices a distinction between the two classes of sentences in *Niboyet* v. *Niboyet*, L. R. 4 P. D. 1, at p. 19.

not seem to be any authority to extend the proposition to a foreign sentence of nullity, in the case of English subjects. In fact, the cases that will be cited are to the contrary effect. It will perhaps, therefore, be convenient to consider separately the effect of foreign sentences of nullity of marriage, and of foreign sentences of divorce :—

(i.) *Foreign Sentences of Nullity of Marriage.*—"The contract of marriage," says Lord Robertson (*u*), "is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties. But it differs from other contracts in this, that the rights, obligations, or duties, arising from it, are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will. It confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties, and privileges thence arising: it gives rise to the relations of consanguinity and affinity: in short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, amongst civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should be for ever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract."

(*u*) See Fergusson on Marriage and Divorce, pp. 397 to 399, cited by Story in his Conflict of Laws (7th ed.), § 109. See also Story's Conflict of Laws (7th ed.), § 200.

The question of marriage or no marriage should be decided by the law of the place where the marriage was celebrated (*x*).

But this rule applies only to the forms and solemnities of constituting a marriage, and to the proof of the parties having made a contract (*y*). Thus in *Brook* v. *Brook* (*z*), it was decided that the law of the country in which a marriage is solemnized cannot give validity to a marriage prohibited by the laws of the country of domicile and allegiance of the contracting parties; so that a marriage with a deceased wife's sister, although valid in Denmark, would be invalid here; and that, therefore, the rule that the *lex loci contractus* determines the validity of the marriage, ought to be limited by an implied proviso that such marriages, if between English subjects, are not contrary to the laws of this country (*a*).

The authority of *Brook* v. *Brook* (*b*), was recognized and acted upon in the case of *Mette* v. *Mette* (*c*), although there the husband had obtained letters of naturalization in Germany before contracting the second marriage prohibited by English law.

(*x*) Per Cresswell, J., in *Brook* v. *Brook*, 3 Sm. & G. 481, at p. 512; and Story's Conflict of Laws (7th ed.), § 113. There are some exceptions to this rule, for instance in the case of polygamous marriages. See Story's Conflict of Laws (7th ed.), p. 147.

(*y*) Per Cresswell, J., in *Brook* v. *Brook*, 3 Sm. & G. at p. 515.

(*z*) 3 Sm. & G. 481; (see especially the judgments of Lord Cranworth and Lord Wensleydale).

(*a*) See also *Harford* v. *Morris*, 2 Hagg. Consist. 423; and per Lord Brougham in *Warrender* v. *Warrender*, 2 Cl. & Fin. 488.

(*b*) 3 Sm. & G. 481.

(*c*) 1 Sw. & Tr. 416. See also *Fenton* v. *Livingstone*, 3 Macq. H. L. Cas. 497.

So also in the case of *Sottomayor* v. *De Barros* (*d*), it was held by the Court of Appeal that the marriage in England of first cousins, being aliens not domiciled in England, if forbidden by the law of their own country, was invalid here.

But the prohibition must, in order to affect the validity of the marriage, be on a matter affecting the personal capacity of the parties to contract the marriage. Thus, in *Simonin* v. *Mallac* (*e*), where the objection to the validity of the marriage, which was solemnized in England, was the want of consent of parents required by the law of France, but not, under the circumstances, by that of this country, it was held that this consent must be considered as a part of the ceremony of marriage, and not as a matter affecting the personal capacity of the parties to contract the marriage (*f*).

And in the case of a foreign marriage which would be considered valid by our courts, viz., where (1) the ceremony has been in accordance with the law of the place of celebration, and (2) the marriage is not prohibited, in respect of matters affecting the personal capacity of the parties to contract the marriage, by the laws of the country of their domicile and allegiance, a sentence of nullity of marriage, if obtained in a foreign

(*d*) L. R. 3 P. D. 1; but see also Sir R. Phillimore's judgment in L. R. 5 P. D. 94. This case was followed in *Bloxam* v. *Favre*, L. R. 8 P. D. 101.

(*e*) 2 Sw. & Tr. 67. But see Brett, L. J.'s, doubts on this case in *Niboyet* v. *Niboyet*, L. R. 4 P. D. 1, at p. 18.

(*f*) See the remarks on this case in *Sottomayor* v. *De Barros*, L. R. 3 P. D. 1, at p. 7; L. R. 5 P. D. 94.

country, which was not the country in which the marriage was celebrated, and of which the contracting parties were not subjects, would not necessarily be considered conclusive in England.

Thus in the case of *Sinclair* v. *Sinclair* (*g*), where the husband appeared under protest to a divorce brought by the wife, alleging, in bar of proceedings, that such suit could not be entertained by the Court, for that the marriage had been celebrated at Paris, and had since been dissolved by a sentence of the court of Brussels on proceedings instituted by him for divorce by reason of cruelty and adultery, Sir William Scott said, "Something has been said on the doctrine of law, regarding the respect due to foreign judgments: and undoubtedly a sentence of separation, in a proper court, for adultery, would be entitled to credit and attention in this court; but I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage, alleged

(*g*) 1 Hagg. Consist. 294.

by the husband, is a French marriage; a French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a court at Brussels, on a marriage in France, would have the same authority, much less on a marriage celebrated here in England."

And it would appear from this case and from *Scrimshire* v. *Scrimshire* (*h*), that even where the sentence of nullity of marriage was pronounced in the same country where the marriage was celebrated, it is not, at all events in the case of English subjects, necessarily conclusive in England; though it will be admitted as evidence, in the proceedings in England, of the law of the foreign country, which may be material for the English Court in determining whether the marriage is valid by the law of England or not. Sir Edward Simpson, in delivering judgment in the above case, said, "This is a suit brought by Miss Jones for restitution of conjugal rights. She pleads a marriage in France, clandestine and forbidden by the laws of both countries, with this difference, that by the laws of France, such marriages are, in all cases, absolutely null; whereas, by the laws of England, they are only irregular, but not null, unless under special circumstances that warrant the Court to put that construction upon them. . . A sentence of the Parliament of Paris, declaring the marriage null, is . . . pleaded, not as bar to entering into the question in this Court, whether the marriage be good or not, but as evidence of the law of France, which

(*h*) 2 Hagg. Consist. 395.

may be material for the consideration of this Court in determining whether this be a good marriage by the law of England, or not. . . The process is for restitution of rights; and the marriage being denied, a question arises incidentally, whether it is a marriage or not, to determine whether the party is entitled to restitution or not, under the marriage which has been pleaded. . . The Court was of opinion then, and still is, that a foreign sentence alone could not, of itself, be a bar to entering into a consideration of the question, whether this marriage between English subjects was good or not by the law of England? The Court thought, however, that such sentence was proper to be pleaded, as a circumstance, or a fact, to make evidence of the law of France, with respect to the question here, on the validity of a marriage celebrated in France. Accordingly, the sentence was pleaded, and admitted in that light; and in that light it seems to be very properly before the Court; as I think the laws of France are very material to be considered, in determining, even by our law, on the validity of a contract of marriage had and made in France. So that the Court, by rejecting the sentence when pleaded in bar, has not determined that the sentence in France, when pleaded as a circumstance, is of no avail." The learned judge then cites some passages from foreign jurists and some earlier English cases, showing that in marriages abroad by English subjects, the English law takes notice of the foreign law. And he afterwards says: "In the present case there has been a sentence of the proper forum, pronouncing on the whole facts of the case, and the principles of the laws of France, as

applied to them. In matters that belong to the *jus gentium*, our Courts always regard the sentences of a proper Court" (*i*).

(ii.) *Foreign Sentences of Divorce.*—The English Courts will examine the validity of foreign decrees of divorce in the same manner, and on the same rules, by which the conclusive effect of other foreign judgments has to be determined (*k*). Thus they will not pay regard to a foreign sentence of divorce, if it appears that it was contrary to natural justice, or that the court which granted it had no jurisdiction (*l*).

The influence of the lex domicilii.—In support of the influence of the law of domicile in questions affecting marriage, Lord Westbury cites the following passage from Rodenberg in *Shaw* v. *Gould* (*m*): "Unicum hoc ipsa rei natura ac necessitas invexit, ut cum de statu et conditione hominum quæritur, uni solum modo Judicii, et quidem Domicilii, universum in illâ jus sit attributum." And Lord Brougham in his judgment in the case of *Warrender* v. *Warrender* (*n*), says: "It certainly may well be urged, both with a view to the general question of *lex loci*, and especially in answering the argument of the alleged essential quality of indis-

(*i*) See also Sir W. Scott's judgment in *Sinclair* v. *Sinclair*, 1 Hagg. Consist. 294, and *ante*, p. 166. And as to the admissibility in England of foreign sentences in affirmation of marriage as evidence of reputation, see Smith's L. C., vol. ii. (8th ed.), p. 871.

(*k*) See per Lord Westbury in *Shaw* v. *Gould*, L. R. 3 H. L. at p. 85.

(*l*) *Shaw* v. *Attorney-General*, L. R. 2 P. & D. 156.

(*m*) L. R. 3 H. L. at p. 83.

(*n*) 2 Cl. & Fin. 283. The passage is cited at length in Story's Conflict of Laws (7th ed.), pp. 247, 248, note.

solubility, that the parties to a contract like this (*o*) must be held emphatically to enter into it with a reference to their own domicile and its laws: that the contract assumes, as it were, a local aspect, but that at any rate, if we infer the nature of any mutual obligation from the presumed intentions of the parties, and if we presume those intentions from supposing that the parties had a particular system of laws in their eye, there is fully more reason to suppose they had the law of their own home in their view, where they purposed to live, than the law of the stranger under which they happened for the moment to be."

So also Lord Selborne, in his judgment in *Harvey* v. *Farnie* (*q*), says: "Let it be granted, (and I think it is well settled,) that the general rule, internationally recognised, as to the constitution of marriage, is that when there is no personal incapacity attaching upon either party, or upon the particular party who is to be regarded by the law to which he is personally subject, that is the law of his own country, then marriage is held to be constituted everywhere if it is well constituted *secundum legem loci contractûs*. But that merely determines what in all these cases is the point you start from. When a marriage has been duly solemnized according to the law of the place of solemnization, the parties become husband and wife. But when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband in a case where the husband is a foreigner in

(*o*) *i.e.*, the contract of marriage.
(*q*) L. R. 8 App. Cas. at pp. 50, 51.

the country in which the marriage is contracted. She no longer retains any other domicile than his, which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in the relation of wife to the husband whom she marries, knowing him to be a foreigner, domiciled and contemplating permanent and settled residence abroad. Therefore it must be within the meaning of such a contract, if we are to inquire into it, that she is to become subject to her husband's law, subject to it in respect of the consequences of the matrimonial relation and all other consequences depending upon the law of the husband's domicile. That would appear to be so on principle. . . . It would appear, therefore, that if this question is to depend on any principle at all, it must be upon the principle of recognising the law of the forum and matrimonial domicile, when, as in this case, they both concur."

The cases that have arisen, and been decided, upon the effect of foreign matrimonial sentences in England, seem to establish the following propositions :

1. *A foreign tribunal has, as far as legal consequences in England are concerned, no authority to pronounce a decree of divorce*, a vinculo matrimonii, *in the case of an English marriage between English subjects, unless such subjects are, at the time when such decree is pronounced*, bonâ fide *domiciled in such foreign country where such foreign tribunal has jurisdiction* (*r*).—Hence if such a divorce is obtained, our courts will, notwith-

(*r*) See Story's Conflict of Laws (7th ed.), § 227 *a*.

standing it, entertain a subsequent petition for divorce in England (*s*).

This proposition was established in the celebrated case of *R.* v. *Lolley* (*t*), although the grounds of the decision there given have been much misunderstood, owing, as it seems, to an erroneous note, which Lord Brougham, who was counsel for the prisoner, appears to have taken of a passage in the judgment in the House of Lords. Thus in *Tovey* v. *Lindsay* (*u*), Lord Brougham (counsel for the appellant), informed the Court that he took a note at the time when the judgment was delivered in Lolley's case, as follows: "That the judges were unanimously of opinion upon the points reserved, that a marriage solemnized in England, was indissoluble by anything except an Act of the legislature." And Lord Eldon seems at first, in the course of the argument, to have adopted this view of the decision, though he afterwards upon consideration, took a different view (*v*). Lord Brougham was apparently influenced by the same erroneous notion of the decision in *Lolley's Case*, in giving judgment in the case of *McCarthy* v. *De Caix* (*w*), a case which has been entirely disapproved of in the recent and important case of *Harvey* v. *Farnie* (*x*) in the House of Lords, and in which Lord Brougham reduced *ad absurdum* the supposed doctrine in *Lolley's Case* (*y*).

(*s*) *Tollemache* v. *Tollemache*, 30 L. J. Matr. 113.

(*t*) 2 Cl. & Fin. 567. This case is very briefly reported. See Dr. Lushington's comments thereon in *Conway (otherwise Beazley)* v. *Beazley*, 3 Hagg. Eccles. 639.

(*u*) 1 Dowl. at p. 127.

(*v*) See Lord Selborne's judgment in *Harvey* v. *Farnie*, L. R. 8 App. Cases at p. 55.

(*w*) 2 Russell & Myl. 614.

(*x*) L. R. 8 App. Cas. 43.

(*y*) In *McCarthy* v. *De Caix*,

And again in *Warrender* v. *Warrender* (*z*), Lord Brougham, in his judgment, says of *Lolley's Case*, "the resolution in *Lolley's Case* was that an English marriage could not be dissolved by any proceeding in the Courts of any other country, for English purposes. In other words, that the Courts of this country will not recognise the validity of a Scotch divorce of an English marriage, but will hold the divorced wife dowable of an English estate, the divorced husband tenant thereof by the curtesy, and either party guilty of felony by contracting a second marriage in England." But this view of the decision in *Lolley's Case*, although it was again adopted by the counsel for the appellant (Mr. Benjamin) in the case of *Harvey* v. *Farnie* (*a*) in the House of Lords, has been finally condemned by the unanimous opinions of Lord Selborne, Lord Blackburn, and Lord Watson in the same case. The actual facts and actual decision in *Lolley's Case*, as taken partly from the judgment of Lord Blackburn in *Harvey* v. *Farnie* (*b*), were as follows :—

An English husband married an English wife in England: he was a domiciled Englishman, she was a domiciled Englishwoman. They continued to be domiciled Englishman and Englishwoman down to the moment when, going into Scotland for a temporary purpose, he there committed adultery, and she,

2 Russ. & Myl. 614, Ld. Brougham is reported to have said that the judges in *Lolley's Case*, "gave a clear and unanimous opinion that no divorce, or proceeding in the nature of a divorce, in any foreign country, Scotland included, could dissolve a marriage contracted in England."

(*z*) 2 Cl. & Fin. at pp. 540, *et seq.*

(*a*) L. R. 8 App. Cases, 43.

(*b*) *Ibid.* at p. 59.

therefore, caused him to be divorced in a Scotch Court. He subsequently married again in England, and was prosecuted for bigamy. The counsel for the defence relied on the Scotch sentence of divorce as dissolving the first marriage, but the prisoner was convicted, subject to the question of law which was reserved, whether the Scotch sentence of divorce dissolved the first marriage or not (*c*). Upon the above facts, it was decided by the twelve judges, upon the point reserved, that there was an English domicile throughout the whole period of the case, and that under those circumstances the marriage could not be dissolved by a foreign court (*d*).

The above proposition is also, to a certain extent, supported by the judgment of Lord Eldon in *Tovey* v. *Lindsay* (*e*), but in that case, in consequence of doubts entertained by Lords Eldon and Redesdale as to whether

(*c*) Although there was evidence of fraud in obtaining the Scotch divorce, the question of fraud was not left to the jury, and was therefore left out of consideration in the reserved case. See *Harvey* v. *Farnie*, L. R. 8 App. Cases at p. 59.

(*d*) See further some comments on *Lolley's Case* in *Shaw* v. *Gould*, L. R. 3 H. L. 55; per Lord Westbury at p. 76; and per Lord Chelmsford at p. 86. The expression used by the judges in *Lolley's Case* was an "English marriage." These words may mean either, (1) the contract of marriage performed in England, or (2) a marriage performed with a domiciled Englishman. See per Lord Selborne in *Harvey* v. *Farnie*, L. R. 8 App. Cas. at p. 46. Lord Blackburn (see p. 59) thinks the judges meant a marriage where the domicile was English from the beginning to the end of the transaction. Possibly Lord Brougham's misinterpretation of the case may have arisen from his adopting the first of the above meanings stated by Lord Selborne.

(*e*) 1 Dowl. pp. 117 & 131. And see per Lord Selborne in *Harvey* v. *Farnie*, L. R. 8 App. Cas. at p. 55, and per Lord Watson at p. 63.

the pursuer had acquired a domicile or not, and the great importance of the question of jurisdiction, then formally raised for the first time, it was remitted for further consideration; and the pursuer dying in the meantime, no further steps were taken. It is also supported by the decision of Dr. Lushington in *Conway* (otherwise *Beazley*) v. *Beazley* (*f*), the facts in which were similar to those in *Lolley's Case*, except that the second marriage took place in Scotland. So also in *Tollemache* v. *Tollemache* (*g*), Williams, J., says, "Without going into the question whether the divorce obtained in Scotland is valid with reference to a subsequent marriage in Scotland (*h*), or expressing any opinion as to the status of the children of that marriage, we are of opinion that, as an English Court of Divorce, we cannot recognise the decree of the Scotch Court, which affected to divorce a domiciled Englishman, as a dissolution of the bond of marriage."

A like decision was given in *Pitt* v. *Pitt* (*i*), in which the matrimonial domicile was English, and the solemnization of the marriage was in England, and Colonel Pitt, the husband, had gone to Scotland, but had not acquired an actual domicile there. The wife, however, did not go to Scotland, and the alleged adultery was not committed

(*f*) 3 Hagg. Eccles. 639.

(*g*) 30 L. J. Matr. at p. 116.

(*h*) That a Scotch divorce, though invalid in England, may be valid in Scotland, see *Shaw* v. *Gould*, L. R. 3 H. L. at p. 88; and Lord Cranworth's judgment in *Dolphin* v. *Robins*, 7 H. L. Cas. 390, as explained by him in *Shaw* v. *Gould*, *ibid.*

(*i*) 4 Macq. Rep. 627; and see Lord Selborne's remarks on the case in *Harvey* v. *Farnie*, L. R. 8 App. Cases at p. 56; see also *Geils* v. *Geils*, 1 Macq. Rep. 255.

in Scotland. Similarly, in *Shaw* v. *Gould* (*j*), it was decided by Lord Westbury, that if the parties marry in England, and the husband, in pursuance of a concerted arrangement between the parties, subsequently goes to Scotland, merely in order to acquire a domicile so as to give the Scotch Courts jurisdiction to grant a divorce, and then a divorce is obtained in Scotland; such divorce would have no binding effect in England, and that the issue of the wife who subsequently married again in the lifetime of the husband, even if the second marriage was valid in Scotland, would not be considered legitimate in England (*k*).

It also appears from Lord Selborne's judgment in the above case of *Harvey* v. *Farnie* (*l*) that the domicile of the wife follows that of the husband, a point which often comes incidentally in question in considering the conclusiveness of a foreign sentence of divorce. So too, in *Le Sueur* v. *Le Sueur* (*m*), where the parties had been married in Jersey, and the wife had been deserted by the husband, who went to reside in the United States;

(*j*) L. R. 3 H. L. 55.

(*k*) See also *Shaw* v. *Attorney-General*, L. R. 2 P. & D. 156.

(*l*) L. R. 8 App. Cas. at pp. 50, 51. From *Shaw* v. *Attorney-General*, L. R. 2 P. & D. 156, it would appear that the petitioner (the wife in that case), might have acquired a legal domicile in the foreign state apart from her husband, and that if she had acquired one, and her husband had submitted himself to the jurisdiction of the foreign court, the English courts would have recognized and acted upon the foreign divorce which the petitioner had obtained. The divorce was not recognized in England as dissolving the marriage, but the decision was given also on the ground of the foreign divorce proceedings being contrary to natural justice, as no personal notice of the proceedings had been given to the husband, who had never been within the state.

(*m*) L. R. 1 P. D. 139.

and the wife acquired a *bonâ fide* domicile in England, and presented a petition in England for the dissolution of her marriage: the original place of the matrimonial domicile having been in England, and the husband never having acquired a domicile in England, it was held that, even if the petitioner, without a sentence of judicial separation, could acquire a distinct domicile in England, she could not make her husband amenable to the *lex fori* of her new domicile (*n*).

2. (α.) *The English courts will recognize as valid a sentence of divorce* a vinculo matrimonii *pronounced by a competent foreign tribunal, where the matrimonial domicile is throughout in the foreign country in which the foreign sentence was pronounced* (β.), *even though the marriage was celebrated in England, and was dissolved for a cause which would not have been sufficient to obtain a divorce in England.*—(α.) The first part of this proposition is supported by the remarks of Lord Westbury in *Shaw* v. *Gould* (*o*) as follows: "The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who, before and at the time of the suit, are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit, without collusion or concert, is a position consistent with all the English decisions."

(*n*) See also, as to the domicile of the wife being that of the husband, *Firebrace* v. *Firebrace*, L. R. 4 P. D. 63. But see *Briggs* v. *Briggs*, L. R. 5. P. D. 163.

(*o*) L. R. 3 H. L. at p. 85.

It is also in accordance with the cases cited in the House of Lords in *Harvey* v. *Farnie* (*p*), and especially with *Warrender* v. *Warrender* (*q*). There is, however, some difference between the facts in the two latter cases. In *Warrender* v. *Warrender*, the petition was presented by the husband, the adultery was alleged to have been committed out of Scotland, and the wife was resident out of Scotland, whereas in *Harvey* v. *Farnie*, the petition was presented by the wife, the crime (adultery) was alleged to have been committed in Scotland, and the husband and wife were both resident in Scotland. However, in both the above cases, the same conclusion was arrived at, viz., that the Scotch sentence of divorce was conclusive in England.

(*β.*) The second part of the proposition depends principally upon the case of *Harvey* v. *Farnie* (*r*) above mentioned. The facts in this case were as follows:— A domiciled Scotchman married, in England, an Englishwoman. Immediately after the ceremony the married couple went to Scotland and resided there as their matrimonial home. Two years after, the wife obtained in Scotland a divorce *a vinculo matrimonii*, on the ground of her husband's adultery. The husband came to England, and married there another Englishwoman, the first wife being still alive. In a suit in England for a decree of nullity of the second marriage at the instance of the second wife, it was held in the House of Lords, affirming the decisions of the President of the Probate and Divorce Division, and of the Court of Appeal, that

(*p*) L. R. 8 App. Cas. 43.
(*q*) 2 Cl. & Fin. 488.
(*r*) Notwithstanding the view of *Lolley's Case* adopted in *Briggs* v. *Briggs*, L. R. 5. P. D. 163, at p. 165.

the Scotch divorce was a sentence of a court of competent jurisdiction, and was effectual not only in Scotland, but in England also. It is also supported, even more strongly by the case of *Maghee* v. *McAllister* (*s*), as in that case the husband and wife were not both in Scotland when the proceedings for a divorce in Scotland were instituted (*t*).

Notwithstanding the cases that have been cited, there appear to be at any rate two important points connected with the subject of foreign divorce, which have not been clearly and satisfactorily determined.

First:—It does not yet seem to have been positively decided whether or not a foreign court has jurisdiction to dissolve a marriage celebrated in England between English subjects domiciled in England, if they have, subsequently to the marriage, removed to the foreign country in which the foreign sentence of divorce was pronounced, and *bonâ fide* acquired a domicile there (*u*).

Thus Lord Selborne, in his judgment in *Harvey* v. *Farnie* (*x*), says that Lord Eldon in *Tovey* v. *Lindsay* (*y*) certainly did not decide the important question which might have arisen if the change to an English domicile had been established, namely, how far a subsequent change of domicile would affect the jurisdiction to dissolve the marriage.

The same point is stated by Lord Selborne in another part of the case (*z*), as follows:—"If the parties were

(*s*) 3 Irish Chanc. 604.

(*t*) See Lord Selborne's remarks on the case in L. R. 8 Chanc. App. at p. 53.

(*u*) Story's Conflict of Laws (7th ed.), § 227 *a*.

(*x*) L. R. 8 App. Cas. at p. 55

(*y*) 1 Dowl. 117.

(*z*) L. R. 8 App. Cas. at p. 47

domiciled in England at the time of the marriage, the question then might arise, if the husband changed his domicile, whether there was not a breach of the contract, and it could not be dissolved according to the law of the new domicile."

It is submitted that perhaps, in the case put by Lord Selborne, the English courts might, in considering the jurisdiction of the foreign court, draw a distinction between the case where the proceedings for dissolution in the foreign court were instituted by the party who had broken the contract (*i.e.*, the husband), and by the wife. Possibly in the former case they might consider that the foreign court had not jurisdiction to dissolve the marriage, and in the latter case that it had such jurisdiction. However the point remains yet to be decided by judicial authority (*a*).

Secondly:—It does not appear to have been satisfactorily decided whether anything short of an actual domicile, *e.g.*, *bonâ fide* residence of both the parties in the foreign country, can give the foreign court jurisdiction to dissolve the marriage.

The point arose in *Niboyet* v. *Niboyet* (*b*), the facts in which were as follows: A marriage was celebrated at Gibraltar, between a Frenchman and an English woman who was a British subject at the time of the marriage. After the marriage, the husband resided for several years

(*a*) If the decision in *Niboyet* v. *Niboyet*, L. R. 4 P. D. 1, is correct, it seems that *a fortiori*, when there has been a change of domicile from a foreign country to England, the English courts will have jurisdiction to grant a divorce. Accord. *Wilson* v. *Wilson*, L. R. 2 P. & M. 435.

(*b*) L. R. 3 P. D. 59.

in England, but retained his domicile of origin, being French consul. The husband filed a petition in the English court for dissolution of his marriage, and afterwards consented to its dismissal. The wife then presented a petition in England for a divorce. The adultery, and the greater part of the desertion, relied on, occurred in England. The husband entered an appearance in the proceedings. It was held in the Court of Appeal (overruling Sir R. Phillimore), by James and Cotton, L.JJ., *dissentiente* Brett, L.J., that the English courts had jurisdiction to grant a divorce.

The judgment of the Court depended partly upon the construction to be put upon the Matrimonial Causes Act (1857) (*c*). James, L.J., in his judgment (*d*), said: "I find myself unable to arrive at the conclusion that the domicile of the complaining party ought to determine the existence of the limits of the jurisdiction given by the statute to the English Court. The only limitation which I can find, is the limitation of the jurisdiction to those matters which come under the category of matrimonial matters in England, to every one of which the English law, with all its consequences, so far as England is concerned, must be applied."

On the other hand Brett, L.J., in the course of an elaborate judgment, in which he cited several American decisions (*e*), said: "On the ground then of the nature

(*c*) 20 & 21 Vic. c. 85, sec. 27.

(*d*) L. R. 4 P. D. at p. 9.

(*e*) L. R. 4 P. D. at p. 19. See especially those collected in Bishop's Treatise on Marriage and Divorce (6th ed.), and referred to in §§ 709, 721, 740, 741, 745. The learned judge also cited Story's Conflict of Laws (7th ed.), § 110, which contains some

of the subject matter of the suit, of the nature of the judgment given in such suit, of the interest of the country in which the dispute arises, of the comity due to other nations, of the immense mischief of a judgment of such a nature being given under circumstances which will prevent it from being recognised everywhere, and of the preponderance of authority in England; I am of opinion, that unless the statute has otherwise enacted, the domicile of the husband in England at the institution of the suit, is, according to the true construction of the statute, the fact which gives jurisdiction to the English Divorce Court to decree a divorce: that, with such a domicile, the Court has jurisdiction over a foreigner as well as over an Englishman: that, without such a domicile, the Court has no jurisdiction, though the party is an English subject. The same rule, I confess, seems to me to apply, for the same reason, to its power to grant any relief which alters in any way that relation between the parties, which arises by law from their marriage. It applies therefore, as it seems to me, to suits for judicial separation, or for the restitution of conjugal rights, but not to suits for a declaration of nullity of marriage, or in respect of jactitation of marriage."

The judgment of Brett, L.J., in the above case certainly seems strictly in accordance with general principles, and, to use an expression of Lord Selborne in *Harvey* v. *Farnie* (*f*), with the whole stream of

remarks of Lord Robertson, taken from Fergusson on Marriage and Divorce, pp. 397 to 399.

(*f*) L. R. 8 App. Cas. at p. 57.

sound authority on the subject of foreign divorce. It is moreover supported by the judgment of Sir R. Phillimore in the Court below (*g*). And, from the remarks made on the case in *Harvey* v. *Farnie* (*h*), it would appear that neither Lord Selborne nor Lord Blackburn were altogether satisfied with the decision of the majority in the Court of Appeal.

II. *Foreign Sentences in Admiralty.*—A sentence of a foreign court of Admiralty condemning a ship as prize is a judgment *in rem*, and is binding on all the world as to the express point decided thereby, namely, as to the change of property in the ship effected by the condemnation (*i*).

It is also held conclusive in England, in actions on policies of insurance between the assured and the underwriter, upon every subject immediately and properly within the jurisdiction of the foreign court and upon which it professed to decide judicially, for instance, on the point as to the neutrality of the ship at the time of

(*g*) See also *Connelly* v. *Connelly*, 11 Jur. 137, referred to in Story's Conflict of Laws (7th ed.), § 596 *a*.

(*h*) See per Lord Selborne at pp. 55, 56; and per Lord Blackburn at p. 60.

(*i*) *Hughes* v. *Cornelius*, 2 Shower, 232; and Appendix B, p. 415; see also *Kindersley* v. *Chase*, Park on Insurance, vol. ii. p. 743. Lord Eldon, however, says in *Donaldson* v. *Thompson*, 1 Camp. 120, "I am by no means disposed to extend the comity which has been shown to these sentences of foreign admiralty courts. I shall die, like Lord Thurlow, in the belief that they ought never to have been admitted. The doctrine in their favour rests upon an authority in Shower which does not fully support it, and the practice of receiving them often leads in its consequences to the greatest injustice."

condemnation (*k*). Thus, in an action in England, on a policy of insurance, it appeared that the ship, warranted American, had been condemned as enemies' property by the sentence of a French Court of Admiralty, for want of having on board a *rôle d'équipage* or list of the crew, such as was required by the marine ordinances of France and adjudged by the court there to be requisite within the meaning of the treaty of commerce between France and America. Held, that the sentence was conclusive evidence against the warranty of neutrality, though in fact the ship was American (*l*).

Again, a sentence of a French Court of Admiralty, adjudging "as lawful prize all the goods and effects which compose the cargo of the ship, since the whole, owing to the captain not being provided with proper and regular despatches and papers, is to be deemed the property of the enemies of the French Republic," was held conclusive, in an action in England on a policy of insurance, against the warranty of neutrality (*m*). Lord Eldon, in the above case, said, "The practice of receiving these sentences as conclusive evidence for collateral purposes, and not merely in suits between the identical parties in the foreign courts, may possibly have first obtained in those cases where the plaintiff himself produced the sentence, in order to prove his loss; and I have reason to believe that the practice

(*k*) *Bernardi* v. *Motteux*, 2 Dougl. 575; *Bolton* v. *Gladstone*, 5 East, 160; *Lothian* v. *Henderson*, 3 B. & P. 517; and the judgments in *Hobbs* v. *Henning*, 17 C. B. N. S. at pp. 823, 826.

(*l*) *Geyer* v. *Aguilar*, 7 T. R. 696.

(*m*) *Lothian* v. *Henderson*, 3 B. & P. 517.

of allowing the underwriters to make use of them, was founded on a notion that every man might come into a Court of Admiralty *pro interesse suo* (*n*), and that all mankind, therefore, were virtually parties to such proceedings. That notion, I apprehend, and am informed, is a mistaken notion, and that the assured, in a policy of insurance with a warranty of neutral character, could not be admitted parties to the proceedings in a court of admiralty, for such collateral purposes as those for which they must of course claim to be admitted. It does not become me, however, for that reason now to impugn a practice acted upon for so long a series of years, and that by men whose judicial character must ever be looked up to with reverence in this country. I well know, also, how much property has been affected by this principle, and how much more may now be afloat on the faith of that long train of decisions in Westminster Hall, by which the principle in question has been sanctioned." In order, however, for such a sentence to be conclusive in England as to the grounds of condemnation, such grounds must be clearly stated on the face of the sentence, without ambiguity (*o*).

Except in the cases above mentioned of actions on policies of insurance between the assured and the under-

(*n*) See judgment of Lee, C. J., in *Roberts* v. *Fortune*, Hargrave's Tracts, p. 168, note; and *ante*, pp. 80, 81.

(*o*) *Bernardi* v. *Motteux*, 2 Dougl. 575; *Salucci* v. *Johnson*, 4 Dougl. 224; *Pollard* v. *Bell*, 8 T. R. 434; *Bird* v. *Appleton*, 8 T. R. 562; *Dalgleish* v. *Hodgson*, 7 Bing. 495; *Hobbs* v. *Henning*, 17 C. B. N. S. 791.

writer, doubts have been entertained as to the admissibility of such sentences in English courts, as evidence on collateral matters, so as to affect the rights of third persons, not actual parties to the sentence (*p*). And, at any rate, such sentences are not pleadable on such collateral matters, by way of estoppel (*q*). Nor, are they conclusive as to any of the premises that led to the adjudication (*r*). In the absence of special grounds for the sentence, it is presumed to have been pronounced on the ground of the ship being enemies' property, unless the contrary distinctly appears on the face of the sentence (*s*). Consequently, the onus does not lie upon the party producing the sentence of showing that it proceeded upon the ground of enemies' property, but upon the other party who objects to the sentence, of showing that it proceeded upon some other ground (*t*). Thus, where a ship, warranted neutral, was condemned as "good and lawful prize," these words were deemed sufficient to negative the neutrality of the ship, because, as no special grounds of condemnation appeared, the Court held themselves bound to suppose that it proceeded upon the ground of the ship being enemies' property (*u*).

(*p*) See per Lord Alvanley, C. J., in *Baring* v. *Clagett*, 3 B. & P. at 215; and *Christie* v. *Secretan*, 8 T. R. 196. But see as to cases in which the collateral matters appear on the face of the sentence, *Lothian* v. *Henderson*, 3 B. & P. 545.

(*q*) *Hobbs* v. *Henning*, 17 C. B. N. S. 791; Park on Insurance, vol. ii. p. 756.

(*r*) *Christie* v. *Secretan*, 8 T. R. 196.

(*s*) *Pollard* v. *Bell*, 8 T. R. 435; and per Lord Alvanley, C. J., in *Baring* v. *Clagett*, 3 B. & P. at p. 216. And see *Barzillai* v. *Lewis*, 3 Dougl. 126.

(*t*) Per Sir W. Grant, M.R., in *Kindersley* v. *Chase*, Park on Insurance, vol. ii. p. 743.

(*u*) *Salvucci* v. *Woodmass*, 6

If however the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but proceeds upon the ground of local regulations arbitrarily imposed by the capturing power, to which neither the government of the captured ship, nor the other powers of Europe, have been made parties, or upon other grounds that do not warrant the condemnation, and such grounds appear on the face of the sentence, the sentence of condemnation will not be admitted as conclusive against the warranty of neutrality (*x*).

But if it appears, on the face of the sentence, that the foreign court came to the conclusion that the ship was, or was to be deemed or considered, as enemies' property, no matter by what deductions they came to that conclusion, the English Courts will consider themselves bound by that conclusion, without being at liberty to examine the premises (*y*). However, when there is any ambiguity on the face of the foreign sentence, the reasons for the sentence are examinable; for the reasons are not always to be considered as of themselves the grounds upon which the condemnation proceeds, but as the media of proof from

Dougl. 345; *Bolton* v. *Gladstone*, 5 East, 160.

(*x*) *Magne* v. *Walter*, Park on Insurance, vol. i. p. 431, vol. ii. p. 730; *Pollard* v. *Bell*, 8 T. R. 435; *Bird* v. *Appleton*, 8 T. R. 562; *Baring* v. *Clagett*, 3 B. & P. 214; *Hobbs* v. *Henning*, 17 C. B. N. S. 791.

(*y*) Per Le Blanc, J., in *Lothian* v. *Henderson*, 3 B. & P. 517; *Magne* v. *Walter*, Park on Insurance, vol. i. p. 431, vol. ii. p. 730; *Pollard* v. *Bell*, 8 T. R. 435; *Bird* v. *Appleton*, 8 T. R. 562; *Price* v. *Bell*, 1 East, 663; *Baring* v. *Clagett*, 3 B. & P. 214.

whence a presumption may be drawn as to whether the ship is or is not lawful prize (*z*).

The sentence of a foreign court of admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it, and not of what may be gathered from it by way of inference (*a*). Thus, in an action on a policy of insurance on goods warranted American, on board a ship from London to Virginia, a sentence of a foreign court which, after reciting that forasmuch as the true destination of the vessel was for the English islands, having been hired and loaded at London and having on board eighty barrels of gunpowder, proceeded to declare the ship and cargo a good prize, was held to be not conclusive evidence against the warranty of neutrality, because the special grounds assigned for the sentence did not necessarily lead to that conclusion. *Semble*, if no grounds at all had been assigned for the condemnation, the sentence would have been conclusive (*b*).

Finally, the English Courts will not recognise the sentence of a prize court of a foreign belligerent power, if it was pronounced in the dominions of a neutral power (*c*). It will be recognised, however, if pronounced in the dominions of a co-belligerent (*d*).

(*z*) *Kindersley* v. *Chase*, Park on Insurance, vol. ii. p. 743; *Baring* v. *Clagett*, 3 B. & P. at p. 216.

(*a*) *Fisher* v. *Ogle*, 1 Camp. 418; *Dalgleish* v. *Hodgson*, 7 Bing. 495.

(*b*) *Calvert* v. *Bovill*, 7 T. R. 523.

(*c*) *The Flad Oyen*, note to *Havelock* v. *Rockwood*, 8 T. R. 270; *Havelock* v. *Rockwood*, *ibid.*; *Donaldson* v. *Thompson*, 1 Camp. 429.

(*d*) *Calvert* v. *Bovill*, 7 T. R. 523.

III. *Foreign Bankruptcy proceedings.*—We shall consider, under the above heading, the effect that is given in England to, 1st. The discharge of a debtor's liabilities, under the bankrupt or insolvent laws of a foreign country; 2ndly. The assignment of a debtor's property, under the bankrupt or insolvent laws of a foreign country; and 3rdly. Attachments, in foreign countries, of debts owing to an English insolvent, after the property has become vested in others under the English bankruptcy law.

1st. *Discharges under foreign bankruptcy laws.*—(a.) Foreign discharges obtained under the laws of the foreign country in which the debt arose.

These, as a rule, are considered conclusive and binding everywhere, and effect is given to them in other countries on the ground of comity (*e*). Care, however, should be taken to distinguish between those cases where the foreign insolvent laws are of such a nature, that a discharge thereunder operates as a virtual or direct extinguishment of the debt itself, and those where the discharge operates merely as a partial extinguishment of the remedy on the debt (*f*), for it is only where the discharge extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, that it will be an effectual answer to a subsequent claim in another country (*g*).

(*e*) Story's Conflict of Laws (7th ed.), § 338, note 4; *Potter* v. *Brown*, 5 East, 124.

(*f*) Story's Conflict of Laws (7th ed.), § 338.

(*g*) *Ellis* v. *McHenry*, L. R. 6 C. P. 228, at p. 234, and the references there given.

(*β.*) Foreign discharges obtained under the laws of a foreign country other than the one in which the debt arose.

These are not, as a rule, considered conclusive in other countries (*h*). Thus a discharge under a commission of bankruptcy in a foreign country is no bar to a subsequent action in England against the debtor, by an English subject, for a debt which arose in England (*i*).

2ndly. *Assignments of a debtor's property, under foreign bankruptcy laws.*—Here a distinction should be drawn between assignments of movable (*i. e.* personal) property, and of immovable (*i. e.* real) property.

With regard to personal property, (including choses in action), the general rule is, that an assignment thereof, according to the *lex domicilii* of the owner, passes the property therein, wherever it may be (*k*). Hence an assignment, under foreign bankruptcy laws, of the personal property of a debtor domiciled (*l*) in that foreign country at the time, is conclusive in England as to the change of property effected by such assignment; and is therefore conclusive against creditors seeking to attach debts owing to the debtor in England, subse-

(*h*) See *ibid.*

(*i*) *Smith* v. *Buchanan*, 1 East, 6. But, *semble*, if the discharge took place in England under English law, it would be conclusive in a subsequent action in England for the debt. *Ellis* v. *McHenry*, L. R. 6 C. P. 228, at p. 234. And, *a fortiori*, if the debt had arisen in the British colonies. See *ibid.*

(*k*) *Sill* v. *Worswick*, 1 H. Bl. 665; *Hunter* v. *Potts*, 4 T. R. 192; *Philips* v. *Hunter*, 2 H. Bl. 402, 405; Story's Conflict of Laws, §§ 403 *et seq.*, 409, and 423 *e*. And, as to the American law relating to foreign proceedings in bankruptcy, see *ibid.* § 410 *et seq.*

(*l*) *Re Blithman*, 35 Beav. 219.

quently to the date of such assignment (*m*). But it is no bar to an action in England for the debt, if the action is founded on a fresh promise made in England subsequently to the foreign assignment, and given for a fresh consideration (*n*). With regard to immovables, the rule is, that the priorities and privileges respecting such property are to be adjusted, and the distribution made, according to the *lex loci rei sitæ* (*o*). Therefore an assignment of such property, under foreign bankruptcy laws, does not affect real estate of the debtor which is situated in England (*p*).

3rdly. *Attachments of debts in foreign countries.*— On the principle above mentioned (*q*), namely that an assignment of movables, according to the *lex domicilii* of the owner, operates to transfer the property therein wherever it may be, the title of the trustees to such property under the English bankruptcy law, over-rides that of a (British) creditor, who has attached debts owing to the insolvent debtor in a foreign country, subsequently to the time when the property vested in the trustees (*r*). And therefore

(*m*) *Solomons* v. *Ross*, 1 H. Bl. 131, note (*a*); *Jallet* v. *Depouthieu*, 1 H. Bl. 132, note. And the foreign assignees will be allowed to sue in England for the debt; per Parke, B., in *Alivon* v. *Furnival*, 1 C. M. & R. at p. 296, citing *Dutch West India Co.* v. *Moses*, 1 Str. 612, and *National Bank of St. Charles* v. *De Bernales*, 1 Ry. & Moo. 190.

(*n*) *Ex parte Burton*, 1 Atk. 255.

(*o*) Story's Conflict of Laws (7th ed.), § 423 *a*.

(*p*) *Ibid*, § 423 *e*, p. 529.

(*q*) See *ante*, p. 190; see also per L. C. in *Selkrig* v. *Davis*, 2 Rose's Bankruptcy Cases, 291, at p. 315.

(*r*) *Wilson's Case*, cited in *Sill* v. *Worswick*, 1 H. Bl. at p. 691; *Ex parte D'Obree*, 8 Ves. Junr. 81; *Neale* v. *Cottingham*, 1 H. Bl. 132, note; *Quelin* v. *Moisson*, 1 Knapp. 266, note; *Ex parte Blakes*, 1 Cox, 398.

whenever the property is brought into England by a (British) creditor who has so attached it in a foreign country, the trustees may recover it from him for the benefit of all the creditors (*s*). And this rule, though restricted, in the foregoing cases, to attachments in foreign countries by British subjects, has, it appears, been extended, in some cases, to attachments by foreign creditors (*t*). But it does not appear to apply to attachments by foreign creditors not subjected to British laws, in cases where the local laws, under which the foreign attachment was made, conferred on such foreign attaching creditors an absolute title to the property attached (*u*).

(*s*) *Sill* v. *Worswick*, 1 H. Bl. 665; *Hunter* v. *Potts*, 4 T. R. 192; *Philips* v. *Hunter*, 2 H. Bl. 402, 405, and *ante*, p. 147 *et seq.*

(*t*) *Royal Bank of Scotland* v. *Cuthbert*, *Stein's Case*, 1 Rose's Bankruptcy Cases, 462 (Appx.).

(*u*) *Le Chevalier* v. *Lynch*, 1 Dougl. 170; *Cleve* v. *Mills*, Cooke's Bankrupt Laws, vol. i. p. 333; *Allen* v. *Dundas*, 3 T. R. 125; Story's Conflict of Laws (7th ed.), §§ 409, and 423 *e* (p. 528).

CHAPTER VII.

DEEDS.

Estoppels by deed are the second class of estoppels referred to by Lord Coke in his division of the subject (*a*) and are called by him estoppels by "matter in writing," which means by deed (*b*). If a man, says an old authority, claims by prescription, liberties, rent, common, and the like, and then takes a grant by letters patent, or deed, this determines his prescription by conclusion, for writing determines contracts and matters *in fait* (*c*).

For the proposition that a man is estopped by his own deed, there is abundant authority in the older books (*d*). Thus, in the case of *Goodtitle* v. *Bailey* (*e*), which was an action of ejectment, Lord Mansfield said: "In such an action, if a man has made a solemn deed, covenanting (*f*) that another shall enjoy the premises, and likewise for further assurance, it shall never lie in his mouth to dispute the title of the party to whom he has so under-

(*a*) See *ante*, p. 1.

(*b*) Shep. Touch. 320, 321; *Stratton* v. *Rastall*, 2 T. R. 366; *Graves* v. *Key*, 3 B. & Ad. 313; *Lampon* v. *Corke*, 5 B. & Ad. 606.

(*c*) See a case in Brooke's New Cases, p. 107.

(*d*) See the cases collected in Vin. Ab. Estop. (M); and see Com. Dig. Estop. (A 2).

(*e*) 2 Cowp. 597.

(*f*) See, however, as to whether an estoppel can arise on a covenant, *post*, pp. 214, 215.

taken; no more than it shall be permitted to a mortgagor to dispute the title of his mortgagee. No man shall be allowed to dispute his own solemn deed (*g*)."

And, in the case of *Lainson* v. *Tremere* (*h*), defendant, the obligor of a bond, was precluded, in an action on the bond, from contradicting, or rather correcting, an error in the condition of the bond. Again, in the case of *Rowntree* v. *Jacob* (*i*), where plaintiff sued for money had and received, and defendant produced a deed of assignment of the money to himself, containing a recital that the consideration money was paid, it was held a good discharge, although there was pregnant evidence of suspicion that the consideration was falsely recited, and that the money had in reality never been paid. So also in the case of *Harding* v. *Ambler* (*k*), a release of certain moneys due in respect of the purchase of a policy of insurance was held binding, although plaintiff's attorney had under-calculated the sum due by £34 (*l*). So also, where commissioners who had executed two mortgages, one later in date than the other, were sued in ejectment by the later mortgagee, it was held that they were estopped from setting up the fact of the earlier

(*g*) See also *Friend* v. *Eastbrook*, 2 Sir W. Bl. 1152; *Right* v. *Proctor*, 4 Burr. 2209; *Johnson* v. *Mason*, 1 Esp. 88; *Wood* v. *Day*, 7 Taunt. 646; and *Bonner* v. *Wilkinson*, 5 B. & Ald. 682, where, on a writ of error to reverse an outlawry on the ground of misdescription, defendant was held estopped by the description in his bond.

(*h*) 1 A. & E. 792.

(*i*) 2 Taunt. 141; and *post*, p. 213.

(*k*) 3. M. & W. 279; see also *Bottrell* v. *Summers*, 2 Y. & J. 412, 414.

(*l*) However, both these two latter cases were decisions of a court of common law, at a time when equitable relief was only obtainable elsewhere.

mortgage, in order to defeat the legal estate of plaintiff's lessor (*m*).

An estoppel by deed binds parties and privies, that is to say, extends to persons claiming under the party estopped (*n*). And an heir is bound by the will of his ancestor as if it were a deed (*o*). However, in the case of a deed poll, only the party making the deed is estopped, while by a deed indented both parties are concluded (*p*).

To the above rule, that a man is estopped from disputing his own solemn deed, there are the following limitations and exceptions:

1. A person is not estopped, by executing a deed, from showing that the transaction of which the deed formed a part was tainted with fraud or illegality, or that the deed itself was an imperfect instrument, or void.

2. Infants and married women are not estopped, by executing a deed, from pleading infancy and coverture as a disability to contract.

3. Corporations, and companies which are incorporated, and other bodies which have special powers given to them, by Act of Parliament, are, in certain cases, not estopped, by executing a deed, from sheltering themselves behind their Act of Parliament, and pleading a statutory disability to enter into the particular contract in question.

1. *Fraud.*—Fraud, as has been already pointed out (*q*),

(*m*) *Doe* d. *Lery* v. *Horne*, 3 Q. B. 760.

(*n*) *Taylor* v. *Needham*, 2 Taunt. 278; *Doe* v. *Stone*, 3 C. B. 176.

(*o*) Bro. Estop. pl. 93.

(*p*) Co. Litt. 47 *b*; *Lewis* v. *Willis*, 1 Wils. 314; Litt. s. 693.

(*q*) See *ante*, p. 70; and as to fraud and imposition opening an estoppel by deed, in favour of the

vitiates all proceedings, whether judicial or otherwise. Its operation on deeds is, however, subject to the following rules:—(1.) In order to vitiate a contract by deed, or to render it a nullity on the ground of fraud, it must be fraud *dans locum contractui* (*r*); (2.) No man may allege his own fraud in order to invalidate his own deed (*s*).

Thus, where an assignment of goods was made in fraud of creditors, this, though void as against the creditors, was nevertheless held to pass the property in the goods as between parties thereto and strangers (*t*).

An heir may, however, in certain cases, impeach the validity of a deed on the ground of his ancestor's fraud (*u*). And, similarly, it appears that a devisee may in certain cases set up his devisor's fraud as a defence to proceedings on a deed. Thus, a settlor by deed purported to grant an annuity out of certain land, and to grant a term of 100 years to a trustee to secure the said annuity. The settlor, however, had no power to grant the term, as the legal estate in the land was at the time outstanding in mortgagees. The settlor died after devising the land to his three sons, who paid off

person imposed upon, see *Hayne* v. *Maltby*, 3 T. R. 438.

(*r*) *National Exchange Company of Glasgow* v. *Drew*, 2 Macq. 103.

(*s*) *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367; *Phillpotts* v. *Phillpotts*, 10 C. B. 85; except where the matter alleged stands with the deed, *Prole* v. *Wiggins*, 3 Bing. N. C. 230; and *post*, p. 216.

(*t*) *Bessey* v. *Windham*, 6 Q. B. 166. But where both parties are *in pari delicto*, it might be otherwise; *Taylor* v. *Bowers*, L. R. 1 Q. B. D. 291; see also *Bowes* v. *Foster*, 27 L. J. Ex. 262.

(*u*) *Doe* d. *Williams* v. *Lloyd*, 5 Bing. N. C. 742.

the mortgage, and the mortgagee reconveyed the estate to the uses of the will. The devisees then sold the land to a purchaser without notice of the annuity. The annuitant then filed a bill in chancery against the trustee of the term and the purchaser, to recover the annuity. But the bill was dismissed by James, V. C., on the ground that the equity of redemption in the testator was not such an estate as enabled him to grant a term, and that the devisees under the will, and the purchaser who took under them, were not estopped from denying the grant of the term (*x*).

And a distinction has also been drawn between cases where an estate passes, and where it does not. Thus it appears that the grantor of an estate who is *particeps criminis* in a fraud affecting the grant, is estopped from setting up the fraud as a defence to an action on the instrument, if an estate passed to the grantee, but not so if no estate passed (*y*).

If the consideration on a deed is illegal, the illegality may be set up as a defence to an action on the deed (*z*), and, in the case of a bond, even though the fact that the consideration is illegal, is inconsistent with the condition

(*x*) *Clemow* v. *Geach*, L. R. 6 Ch. App. 147. Lord Hatherley, who affirmed the decision on appeal, declined to decide the question of estoppel. He said, "I am inclined to think that there is no estoppel, but the whole doctrine of estoppel is of extreme nicety, and I prefer to decide on the ground that the question is legal."

(*y*) Smith's L. C. (8th ed.), vol. ii., p. 551, note on *Merryweather* v. *Nixan*, commenting on *Doe* d. *Roberts* v. *Roberts*, 2 B. & Ald. 367.

(*z*) *Collins* v. *Blantern*, Smith's L. C. (8th ed.), vol. i, p. 387, and notes thereto.

of the bond (*a*). This depends upon the well-known rule of law—'Exturpi causâ non oritur actio.' The principle is well stated by Abinger, C. B., in *Gas Light and Coke Company* v. *Turner* (*b*), as follows: "All the decisions show that at common law a contract entered into to effect an illegal purpose is void, and cannot be enforced, and it makes no difference that the contract is under seal It is true that you cannot add to a contract under seal anything to vary the contract, but you may show *dehors* the instrument, that such contract was entered into for an illegal purpose. Such proof does not vary the terms of the contract, but merely shows the illegal object." So also, Martin, B., in *Horton* v. *Westminster Improvement Commissioners* (*c*) says: "The meaning of estoppel is this: that parties agree, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement."

It appears that it is on the above principle that the following rule depends, namely, that a party cannot, by his own private instrument, defeat the object of an Act of Parliament, to the prejudice of others who were not parties to the deed.

(*a*) *Pole* v. *Harrobin*, 9 East. 416 (note); *Paxton* v. *Popham*, 9 East. 408, 421; *Greville* v. *Atkins*, 9 B. & C. 462.

(*b*) 6 Bing. N. C. at p. 327; see also the judgment of Tindal, C. J., in the court below, 5 Bing. N. C. at p. 675.

(*c*) 7 Ex. 780, at p. 791: see also *Royal British Bank* v. *Turquand*, 5 E. & B. 248; 6 E. & B. 327.

Thus the trustees under a public Act of Parliament, which empowered them to mortgage the tolls, but not the toll houses, lest any particular creditors should gain priority over others, mortgaged the toll houses. In ejectment against them by the mortgagees, held that the trustees were not estopped by their deed from insisting that the Act gave them no such power (*d*). A party may however waive the provisions of an Act of Parliament, which were intended for his own benefit, and the waiver of which does not operate to the prejudice of others (*e*).

Similarly, if two parties enter into a contract, though under seal, for the express purpose of evading the provisions of an Act of Parliament, then, in an action on the contract by one of them, the other is not estopped from setting up that fact as a defence. Thus, in ejectment by the grantee of an annuity against the grantor, to recover the premises on which the annuity had by deed been secured, it appeared that no memorial had been enrolled under the Annuity Act (*f*). Held that defendant was not estopped from showing that the annuity had been granted in contravention of the Act, even assuming that a covenant by defendant, contained in the deed, amounted to a declaration which, if true, would have made the enrolment unnecessary (*g*). Again, a covenant by a party to a deed, that premises were of

(*d*) *Fairtitle* v. *Gilbert*, 2 T. R. 169; *Doe* d. *Baggaley* v. *Hares*, 4 B. & Ad. 435; and as to the grounds of the decisions in these cases, see *Doe* d. *Leey* v. *Horne*, 3 Q. B. 766; see also *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642.

(*e*) Per Abbott, C. J., in *Bonner* v. *Wilkinson*, 5 B. & Ald. 682.

(*f*) 53 G. 3, c. 141.

(*g*) *Doe* d. *Chandler* v. *Ford*, 3 A. & E. 649. So also a party is not estopped from showing that a

certain value (and therefore came within a certain statutory exception) was held not to estop the parties from showing that the premises were not really within the statutory exception, and that the covenant in the deed was in reality an attempt to evade the provision of an Act of Parliament (*h*). And it was held a good plea, to an action on a covenant in a lease, that the premises had been let to defendant by plaintiff, for the express purpose of being used by defendant for a purpose forbidden by statute (*i*).

But, in an action brought upon an annuity deed of a testator against his executors, held that they were estopped from pleading that the deed was made fraudulently and collusively between testator and plaintiff, for the purpose of multiplying votes, and subject to a secret trust and condition that no estate or interest should pass beneficially to plaintiff by the deed. For under the statutes (7 & 8 W. 3, c. 25, s. 7, and 10 Ann, c. 31, s. 1) a fraudulent conveyance, made for the mere purpose of conferring a vote, was void only to the extent of preventing the right of voting being acquired, but was valid and effectual, as between the

deed is void under the Mortmain Act, 9 G. 2, c. 36. See *Doe* d. *Preece* v. *Howells*, 2 B. & Ad. 744.

(*h*) *Doe* d. *Chandler* v. *Ford*, 3 A. & E. 649. This decision may, however, be supported on the ground that no estoppel arises out of a mere covenant, see *post*, pp. 214, 215.

(*i*) *Gas Light & Coke Co.* v. *Turner*, 6 Bing. N. C. 324; and see further, as to the rule that there can be no estoppel in face of an Act of Parliament, the notes to *Collins* v. *Blantern*, Smith's L. C. (8th ed.), vol. i., p. 387; and the remarks of Bacon, V.C., in *In re Stapleford Colliery Co., Barrow's Case*, L. R. 14 Ch. D. 432, at p. 441.

parties, to pass the interest. It was on the ground also of illegality, that deeds of separation were formerly not pleadable in the ecclesiastical court, as a bar to its further proceedings, being considered to be illegal contracts, implying a renunciation of stipulated duties, and an assumption of a false character, contrary to the real *status personæ* (*k*).

The true test whether a demand connected with an illegal transaction is capable of being enforced at law or not, depends on the question, whether or not plaintiff requires any aid from the illegal transaction to establish his case. If he does, he cannot enforce his claim. For, 'Allegans suam turpitudinem non est audiendus' (*l*). If he does not, he can recover, unless he is *in pari delicto* with defendant; for in the latter case the rule applies, 'In pari delicto potior est conditio defendentis aut possidentis' (*m*).

Thus, plaintiff laid an illegal wager with B., and defendant assumed a part in the bet. Plaintiff won the bet. It was expected that B. would pay on a certain day, before which time, plaintiff, at defendant's request, lent him his share of the winnings, advancing the money to him. B. died insolvent before the day of payment, and the bet was never paid. Held that, inasmuch

(*k*) See per Sir W. Scott in *Mortimer* v. *Mortimer*, 2 Hagg. Consist. at p. 318, cited by Lord Westbury in *Hunt* v. *Hunt*, 31 L. J. Ch. 161.

(*l*) 4 Inst. 279.

(*m*) See per James, L.J., in *In re Maplebeck, Ex parte Caldecott*, L. R. 4 Ch. D. 150. But if money has been paid under compulsion, and so that, though both parties are *in delicto*, they are not *in pari delicto*, the money may be recovered back. *Atkinson* v. *Denby*, 6 H. & N. 778; 7 H. & N. 934.

as plaintiff could not establish his case without the aid of the illegal wager, he could not recover (*n*).

Plaintiff, being in embarrassed circumstances, in pursuance of an arrangement between himself and A., made over to A. all his stock in trade, and fictitious bills of exchange were given by A. in plaintiff's favour. Possession of the goods was given to A., together with an inventory, but no bill of sale was executed by plaintiff. The object of the transaction was to prevent plaintiff's creditors getting hold of the goods, and so g paid in full. Defendant was a creditor for £100, a d was cognizant of what had been concocted between A. and plaintiff. After A. had removed the goods from plaintiff's premises, two meetings of plaintiff's creditors were held, but no compromise was effected with the creditors. Some months afterwards A. executed a bill of sale of the goods to defendant, for the alleged purpose of securing the debt due from plaintiff to defendant, but plaintiff was no party to the bill of sale, nor did he sanction or know of it. Plaintiff having demanded the goods from A. and defendant, brought an action against defendant for their detention. Held, that the fraudulent purpose not having been carried out, plaintiff was not relying on the illegal transaction, but was entitled to repudiate it, and to recover his goods from A., and that defendant had no better title than A., as he knew how A. had become possessed of the goods (*o*).

It must be remembered, however, in applying the

(*n*) *Simpson* v. *Bloss*, 7 Taunt. 246.

(*o*) *Taylor* v. *Bowers*, L. R. 1 Q. B. D. 291; see also *Bowes* v. *Foster*, 27 L. J. Ex. 262.

above principle, that the defence of illegality depends partly upon the question whether or not the contract sued upon is executory or executed. For certain contracts, though invalid whilst they remain executory, are considered valid when executed, in accordance with the rule 'Quod fieri non debuit factum valet' (*p*).

Imperfect and void deeds.—A person, by executing a deed, is not estopped from showing that the deed is imperfect or void. Thus, in an action on a covenant contained in a lease by indenture, where the counterpart had been executed by the lessee (defendant), but the original lease had only been executed by two out of the four lessors, held, that defendant was not estopped by his execution of the counterpart, from showing, under a plea of *non est factum*, that only two lessors had executed the original lease (*q*). It does not appear, however, that this rule, though applied as above to a covenant contained in a lease by deed, would be applicable to a covenant contained in an ordinary deed. For, in *Pitman* v. *Woodbury* (*r*), Parke, B. draws the following distinction between the two cases. He says, "The cases establish, that a covenantee in an ordinary indenture, who is a party to it, may sue the covenantor who

(*p*) *Ayerst* v. *Jenkins*, L. R. 16 Eq. 280, and for a list of older cases where relief was granted or refused in equity under similar circumstances, see *Benyon* v. *Nettlefold*, 3 Mac. & G. 100, at pp. 100, 101; and for further information, see the notes to *Marriott* v. *Hampton*, and *Merryweather* v. *Nixan*, in Smith's L. C. (8th ed.), vol. ii., p. 551.

(*q*) *Wilson* v. *Woolfryes*, 6 M. & S. 341; *Cardwell* v. *Lucas*, 2 M. & W. 111; see, however, *Cooch* v. *Goodman*, 2 Q. B. 598; *Aveline* v. *Whisson*, 12 L. J. C. P. 58.

(*r*) 3 Ex. 11; see also *Stratman* v. *Ambler*, 8 Ex. 72.

executed it, although he himself never did: for he is a party, although he did not execute, and parties to an indenture may sue, though strangers cannot; and it makes no difference that the covenants of the defendant are therein stated to be in consideration of those of the covenantee. Of this there is no doubt, nor that a covenant binds without consideration. But with respect to leases by indenture, the older authorities show that the covenants, which depend on the interest of the lease, and are made because the covenantor has that interest, such as those to repair and pay rent during the term, are not obligatory if the lessor does not execute; not because the lessor is not a party, but because that interest has not been created to which covenants are annexed, and during which only they operate; as such covenants undoubtedly do not, if the term ends by surrender, and are suspended by eviction by the lessor, so they do not begin to operate unless the term commences. The foundation of the covenant failing, the covenant fails also. Unless there be a term, a covenant to repair during it is void. But with respect to collateral covenants not depending on the interest in the land, it is otherwise, and they are obligatory. This rule of law is to be found in the older authorities, which are collected in Com. Dig. 'Covenant' (F)."

Again, a person is not estopped by a statement contained in a deed which he did not execute, unless he claims under a person who executed it (*s*). And neither party to a deed is estopped, by executing it, from ob-

(*s*) *Doe* d. *Shelton* v. *Shelton*, 3 A. & E. at p. 283.

jecting to its validity, that it is not properly stamped (*t*). Further, no estoppel arises out of a void deed (*u*).

2. *Infants and Married Women.* — These are not estopped, by executing a deed, from pleading their infancy or coverture respectively.

Thus an old writer says (*x*), "If an infant delivers a deed which bears date two years after, and at the end of the two years he is of full age, he shall not be estopped to show the delivery before the date, neither shall a *feme covert.*" So if a *feme covert* were bound by the name of A. S., widow, or if an infant were bound by the name of J. S., of 30 years old, yet the *feme* might plead coverture, and the infant infancy (*y*). Again, if a *feme covert* or infant joined in granting a lease, the lessee was not estopped from pleading *nil habuit tenementis*: for estoppels must be mutual, and as the *feme covert* or infant could not be estopped, neither would the lessee (*z*). A married woman is, however, bound by estoppel by a recital in a deed duly executed and acknowledged by her (*a*).

(*t*) *Steadman* v. *Duhamel*, 1 C. B. 888.

(*u*) Per Parker, C.J., in *Mitchel* v. *Reynolds*, 1 P. Wms. 196. And a recital in a void bond raises no estoppel. *Norfolk's Case*, Hardres, 464. But it is otherwise in the case of deeds which are merely voidable; see *Dunn* v. *Wyman*, 51 L. J. Q. B. 623.

(*x*) Plowden's Queries, p. 121.

(*y*) Vin. Ab. Estop. p. 474, citing Bro. Estop. pl. 98, and Vin. Ab. Estop. p. 432 ‡, citing *Linch* v. *Hooke*, 6 Mod. 311.

(*z*) *Brereton* v. *Evans*, 2 Cro. Eliz. 700; see also a note in *James* v. *Landon*, 1 Cro. Eliz. 36. A *feme covert* might, however, be estopped by a record, *e.g.*, a fine recorded. *Hume* v. *Burton*, 1 Ridgway's P. R. at p. 567. But even this estoppel only continued to operate during her coverture. Com. Dig. Estop. p. 195.

(*a*) *Jones* v. *Frost*, L. R. 7 Ch. App. 773.

Where an infant, being disabled from contracting by 53 G. 3, c. 141, s. 8, granted an annuity with A., and they covenanted jointly and severally to pay it, held, that the infancy of the grantor did not exonerate A. from his separate contract. But *quære*, by Tindal, C.J., whether, if the covenant had been merely a joint one, the statutory avoidance as to the infant might not have avoided it as to both (*b*). Infants are now incapacitated from contracting, except for necessaries, by the Infants' Relief Act, 1874 (*c*). And married women's contracts are regulated by the Married Women's Property Act, 1882 (*d*).

3. *Corporations and Companies* which are incorporated, and other bodies which have special powers given to them, by Act of Parliament.

The law respecting the liability of corporations which are created by Act of Parliament, is well stated by Parke, B., in *South Yorkshire Ry. Co.* v. *Great Northern Ry. Co.*(*e*), as follows: "Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his own deed. Contracts with partnerships stand upon a different footing. They relate to the power of one member of a partnership to bind the other, and constitute a branch of the law of principal and agent. In partnerships, where all the members do not concur in the contract (and it is often that they do not),

(*b*) *Gillow* v. *Lillie*, 1 Bing. N. C. 696.
(*c*) 37 & 38 Vic. c. 62.
(*d*) 45 & 46 Vic. c. 75.
(*e*) 9 Ex. 55.

one partner may bind the other in all contracts within the scope of their ordinary partnership dealings; in those beyond, the individual partners making the contract are bound, not the other partners. But corporations, which are creations of law, are, when the seal is properly affixed, bound just as individuals are by their own contracts, and as much as all the members of a partnership would be by a contract in which they all concurred. But where a corporation is created by an Act of Parliament for particular purposes, with special powers, then indeed another question arises. Their deed, though under their corporate seal, and that regularly affixed, does not bind them if it appear by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires*, that is, that the legislature meant that such a deed should not be made The question then appears to me to be simply this, whether it can be reasonably made out from the statute that this covenant is *ultra vires*, or, in other words, forbidden to be entered into by either the plaintiffs or the defendants; and that question must depend on the construction of the general Act (incorporated with the particular Acts) establishing each of these litigating companies (*f*)."

It is beyond the scope of this work to enter into any

(*f*) See also per Lord Selborne in *Ashbury Ry. Carriage Co.* v. *Riche*, L. R. 7 H. L. 653, as follows: "A statutory corporation, created by Act of Parliament, is limited as to all its powers by the purposes of its corporation, as defined in its special Act." See also *Chambers* v. *Manchester & Milford Ry. Co.*, 5 B. & S. 588; and *Eley* v. *Positive Assurance Co.*, L. R. 1 Ex. D. 20 & 88.

detail into the question of the liability of incorporated companies on their contracts under seal. The discussion of this question more properly belongs to a work upon contract or *ultra vires*, or especially devoted to company law.

However, one or two instances may be here given which may serve to illustrate the principle applicable to company cases, where *ultra vires* is relied upon as an answer to a plea of estoppel by deed (*g*).

The original mode of forming a joint stock company was by means of a deed of settlement, which constituted trustees of the partnership property, directors of the partnership affairs, auditors of its accounts, and other officers, defined the number of shares into which the capital was divided, and the form and mode of transferring them, and laid down rules for periodical meetings of the shareholders. In the absence of legislative interference, the rights and liabilities of the members of such bodies, in relation to the public, were the same as those of other members of ordinary partnerships, their rights and liabilities, *inter se*, depended on the provisions of the deed of settlement (*h*). But in the case of companies incorporated under the Companies Act of 1862, the articles of association take the place of the deed of settlement, and the memorandum of association regulates the rights and liabilities of the company with regard to the general public. Thus in *Ashbury Railway Carriage Co.* v.

(*g*) Other company cases are given in the chapter dealing with estoppels by representation. See *post*, pp. 380 *et seq.*

(*h*) Kerr's Blackstone (4th ed.), vol. i., p. 479; see also per Lord Wensleydale in *Ernest* v. *Nicholls*, 6 H. L. Cas. at p. 423.

Riche (*k*) Lord Cairns, L. C., says, "I will ask your lordships to observe the marked and entire difference there is between the two documents which form the title deeds of companies of this description—I mean the memorandum of association on the one hand, and the articles of association on the other. With regard to the memorandum of association, your lordships will find, as has often been already pointed out, although it appears somewhat to have been overlooked in the present case, that that is, as it were, the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and, so accepting it, the articles proceed to define the duties, the rights, and the powers of the governing body as between themselves and the company at large, and the mode and form in which the business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. With regard, therefore, to the memorandum of association, if you find anything which goes beyond that memorandum, or is not warranted by it, the question will arise whether that which is so done is *ultra vires*, not only of the directors of the company but of the company itself. With regard to the articles of association, if you find anything which, still keeping within the memorandum

(*k*) L. R. 7 H. L. at p. 664; and see per Amphlett, B., in *Eley* v. *Positive Assurance Co.*, L. R. 1 Ex. D. at p. 24.

of association, is a violation of the articles of association, or in excess of them, the question will arise whether that is anything more than an act *extra vires* the directors, but *intra vires* the company."

Thus acts done by the directors which are merely in contravention of the articles of association (or of the deed of settlement under the old system), may be ratified by the subsequent assent of the whole body of shareholders (*l*), but not so acts which are not warranted by the memorandum of association (*m*).

But it appears that even if a company execute a deed in contravention of its Act, it may nevertheless be liable on it, if there is nothing illegal on the face of the instrument, and if by its means the company has obtained money which it has applied for its legiti-

(*l*) *Spackman* v. *Evans*, *Evans* v. *Smallcombe*, and *Houldsworth* v. *Evans*, L. R. 3 H. L. 171; and see *Bargate* v. *Shortridge*, 5 H. L. Cas. 297, where a distinction is drawn by Lord St. Leonards, between acts of commission and omission on the part of the directors.

(*m*) *Ashbury Railway Carriage Co.* v. *Riche*, L. R. 7 H. L. 653. Incorporated bodies are, in certain cases, not liable on contracts which are either (*a*) unconnected with the purposes of their incorporation, or (*b*) beyond the scope of their powers. (*a*) *Mayor of Norwich* v. *Norfolk Ry. Co.*, 4 E. & B. 413; *Attorney-General* v. *Great Northern Ry. Co.*, 1 D. & S. 154; (*b*) *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. Cas. at pp. 347, 355. But where no offence is to be committed against the public, and there is a mere want of authority for a transaction amongst private individuals or commercial companies, which authority can only be obtained by Act of Parliament, no objection whatever can successfully be made to the parties entering into an agreement for completing the transaction when the necessary authority is obtained. See *ibid.*, at pp. 358, 381.

mate purposes; there being no actual fraud in the transaction, and the shareholders not having been injured thereby (*n*).

Thus a railway company issues Lloyd's bonds, contrary to statute. The bonds are therefore void, but they contain on the face of them a representation which, if true, makes the transaction legitimate. The company subsequently goes into liquidation, and the holders of the bonds make a claim against the company's assets. Held that their claim is good for those sums of money in respect of which the bonds were given, and of which the company had the benefit for its legitimate purposes (*o*). Per Giffard, L. J. (at p. 762), "In so far as the company has had the benefit of those loans for its legitimate purposes, it must be taken to have adopted the transaction. It cannot be heard to say the contrary, and to that extent must be held liable."

Moreover, the onus lies on a defendant company which is sued on an illegal instrument, of showing that it was executed in contravention of their Act. Thus, Parke, J., in *Hill* v. *Manchester & Salford Water Works Company* (*p*) says "It was for the company, if they

(*n*) *Hill* v. *Manchester & Salford Water Works Co.*, 2 B. & Ad. 544; and see *Webb* v. *The Commissioners of Herne Bay*, L. R. 5 Q. B. 642. And see further as to the liability of incorporated bodies on contracts (even though not under seal) of which they have had the benefit, *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. Cas. at p. 372; *Hunt* v. *Wimbledon Local Board*, L. R. 4 C. P. D. 48; *Fishmongers' Co.* v. *Robertson*, 5 M. & G. 192, *Copper Miners* v. *Fox*, 16 Q. B. 229. *Boileau* v. *Rutlin*, 2 Ex. 665.

(*o*) *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. App. 748.

(*p*) 2 B. & Ad. at p. 553. And it must be clearly shown that

disputed their liability, to open the estoppel arising from their own admissions by showing that the consideration of the bonds was illegal, or inconsistent with the statutes under which they acted, or that there was no consideration."

And further, it is necessary to distinguish between cases where the statutory provisions in contravention of which the company has acted are imperative, and cases where they are merely directory. For, it is only imperative enactments which cause an act done contrary to them to be void (*q*).

Thus, by a local statute, the trustees of a turnpike road were empowered to let tolls by writing under their hands and seals; the rent to be made payable to the treasurer, in default of which, every lease made by the trustees was to be null and void to all intents and purposes whatever. Held, that the words were imperative, and that a lease making the rent payable to the trustees or their treasurer was absolutely void; and that the lessee's surety might take advantage of the defect, in an action against him by the trustees, on his covenant, for arrears of rent, even although the lessee had taken the tolls for several years under the lease (*r*). Per Taunton, J., at p. 96, "I understand the distinction to be, that a clause is directory where the pro-

the contract was in contravention of the Act. See per Lord St. Leonards in *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. Cas. at p. 381.

(*q*) Per Parke, B., in *Gwynne* v. *Burnell*, 2 Bing. N. C. at pp. 39, 40; *In re Alma Spinning Co., Bottomley's Case*, L. R. 16 Ch. D. 681.

(*r*) *Pearce* v. *Morrice*, 2 A. & E. 84.

visions contain mere matter of direction, and nothing more; but not so, where they are followed by such words as are used here, namely, that anything done contrary to such provisions shall be null and void to all intents. These words give a direct, positive, and absolute prohibition."

The effect of an estoppel by deed is to prevent the party who has executed it from impugning the general effect of the deed, or any particular statement or clause therein contained (*s*). For instance, it has been held that the receipt for the consideration money, if contained in the body of the deed, is binding upon the parties at law (*t*), though equity will grant relief on proof that the money was not paid (*u*). But the receipt for the consideration money indorsed on a deed, being no part of it, is not an estoppel, but only evidence (*x*).

It is a general rule, with respect to estoppels arising from statements in deeds, that no estoppel can arise by deed, except on a representation of an existing fact (*y*). Thus, where the condition of an obligation was to pay 20*d.* weekly for the keeping of a bastard, according to an order made by justices, defendant, in an action on the

(*s*) Cowp. 600; Co. Litt. 47 *b*; *Doe* d. *Chandler* v. *Ford*, 3 A. & E. 649; *Gwyn* v. *North Canal Navigation Co.*, L. R. 3 Ex. 209.

(*t*) *Rowntree* v. *Jacob*, 2 Taunt. 141; *Baker* v. *Dewey*, 1 B. & C. 704; *Potts* v. *Nixon*, 5 Ir. R. C. L. 45

(*u*) *Ryle* v. *Haggie*, 1 Jac. & W. 234.

(*x*) *Lampon* v. *Corke*, 5 B. & Ald. 606; *Graves* v. *Key*, 3 B. & Ad. 313.

(*y*) And, in order to ascertain what is the precise representation relied upon as an estoppel, it is necessary to look to the general effect of the deed. See per Jessel, M.R., in *General Finance Co.* v. *Liberator Building Society*, L. R. 10 Ch. D. 15, citing *Crofts* v. *Middleton*, 2 K. & J. 194.

bond, was held estopped from pleading that no such order was made. But it would have been otherwise if the condition had been according to an order to be made, for that is executory (*z*).

Thus it has been doubted whether an estoppel can arise on a covenant contained in a deed (*a*). However, where an underlessee covenanted to perform all the covenants contained in the original lease, in an action for breach of covenant brought against him by his lessor, held, that he was estopped from saying that there were no such covenants in the original lease (*b*). And, in ejectment, a covenant for further assurance, contained in a deed of release, was held to estop plaintiff from disputing the title of defendant, to whom he had covenanted (*c*). But the covenants for title in a mortgage deed of freeholds, that the mortgagor has full power to grant and convey the premises in manner aforesaid, have been held not to amount to that precise averment, that the mortgagor is seised of the legal estate, which is necessary to create an estoppel, as against him and those claiming under him (*d*). For it was pointed out

(*z*) *Germin* v. *Randal*, Noy's Rep. 79; see also *Bensley* v. *Burdon*, 8 L. J. Ch. 85, cited by Jessel, M.R., in *General Finance Co.* v. *Liberator Building Society*, L. R. 10 Ch. D. 15.

(*a*) Per Lord Denman, C.J., in *Doe* d. *Chandler* v. *Ford*, 3 A. & E. 649, at p. 655; and per Jessel, M.R., in *General Finance Co.* v. *Liberator Building Society*, L. R. 10 Ch. D. 15, at pp. 23, 24.

(*b*) *Atkinson* v. *Coatsworth*, 8 Mod. 33; 1 Strange, 512; and for another case, in the older reports, of an estoppel arising on a covenant, see *Barwicke* v. *Gybson*, Cro. Jac. 297, case 4.

(*c*) *Right* v. *Proctor*, 4 Burr. 2209; *Goodtitle* v. *Bailey*, 2 Cowp. 597, and *ante*, p. 193.

(*d*) *General Finance Co.* v.

by Jessel, M. R., in his judgment (*e*), that such a covenant, when its effect is considered in conjunction with the whole deed, is not a mere assertion that the covenantor has the legal estate, but an agreement really that if he has it not, he will pay for it. "It is a bargain," says the learned judge, "that he has power to convey; but not an assertion that he has the estate, and so it does not appear to me to be at all clear that that would amount to that precise averment of a fact, which is necessary in order to support the doctrine that a subsequent conveyance of the legal estate will, so to say, fill up the estoppel previously created."

Before the Real Property Amendment Act (*f*) the word "grant" in a deed of conveyance, created an implied warranty of title, but the law on this point was altered by sec. 4 of the above Act, and now, by the Conveyancing Act, 1881 (*g*), the word "grant" is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal. And, even if the word grant were used, no estoppel would arise upon it (*h*).

Estoppels arising out of recitals in deeds.—Estoppels by recitals, and conditions in bonds, depend principally upon a rule which may be formulated thus: a person is not estopped by executing a deed, from saying a thing

Liberator Building Society, L. R. 10 Ch. D. 15.

(*e*) *Ibid.*

(*f*) 8 & 9 Vic. c. 106.

(*g*) 44 & 45 Vic. c. 41, s. 19. The section is retrospective in its operation.

(*h*) *Right* v. *Bucknell*, 2 B. & Ad. 278, at p. 282; Com. Dig. Estop. A, 2; *Heath* v. *Crealock*, L. R. 10 Ch. App. 30; *General Finance Co.* v. *Liberator Building Society*, L. R. 10 Ch. D 15, dissenting from the opinion of Sir John Leach in *Bensley* v. *Burdon*, 2 S. & S. 519.

that stands with the deed, that is to say, he is not estopped from giving evidence which explains the deed, and shows the intention of the parties thereto (*i*). Thus no estoppel can arise on a deed, so as to prevent the parties alleging the truth, if the truth appears on the face of the deed (*k*).

The older authorities on the subject of estoppel by recital are somewhat conflicting, and it is difficult to ascertain from them when a recital operated as an estoppel, and when it did not (*l*). Lord Coke says, "Every estoppel ought to be a precise affirmation, not a rehearsal. Therefore a recital concludes not because it is not direct affirmation (*m*)." However, there are several old authorities to the contrary (*n*).

And with respect to the above dictum of Lord Coke, Lord Denman, C. J., in *Bowman* v. *Taylor* (*o*), says, "As to the doctrine laid down in Co. Litt. 352 b., that a recital doth not conclude because it is no direct affirmation, the

(*i*) Vin. Ab. Estop. pp. 469—473; *Doe* d. *Freeland* v. *Burt*, 1 T. R. 701; *Stroughill* v. *Buck*, 14 Q. B. 781; *South Eastern Ry. Co* v. *Warton*, 6 H. & N. 520; *Morton* v. *Woods*, L. R. 4 Q. B. 293; and the other cases cited in the discussion on estoppel by recital, *post*, p. 219 *et seq.*

(*k*) *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 A. & E. 2; *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23; *Saunders* v. *Merryweather*, 3 H. & C. 902.

(*l*) See the instances given in Vin. Ab. Estop. pp. 453 *et seq.*

(*m*) Co. Litt. 352 *b*; Vin. Ab. Estop. p. 454; Bro. Estop. pl. 127; Fitz. Estop. pl. 207.

(*n*) *Corrant's Case*, Dyer, 196 *a*, note (41); and see a case in Jenkins' Rep. (fifth cent.), case IV., p. 196, cited in Vin. Ab. Estop. p. 461. See also as to when a recital operated as an estoppel, the references in *Branthwait's Case*, 3 Leon. 118, and *Rawlins' Case*, Jenkins' Rep. (sixth cent.), case XLVI., p. 254.

(*o*) 2 A. & E. 278.

authority of Lord Coke is a very great one; but still, if a party has by his own deed recited a specific fact, though introduced by a "whereas," it seems to me impossible to say that he shall not be bound "by his own assertion, so made under seal." This is in accordance with the older, and also with modern authorities. Thus, in *Salter* v. *Kidley* (*p*). Holt C. J. said, "General recital is not an estoppel, but a recital of a particular fact is so."

But, there must be no ambiguity about the meaning of the statements in a recital in a deed, in order that it may estop the parties to the deed from showing the existence of a different state of facts from that which would appear from such statements (*q*). Thus, in *Right* v. *Bucknell* (*r*), it was held, that a recital in a deed of release, that releasor was "legally or equitably" entitled to an estate, was held not to be sufficiently certain to create an estoppel. Similarly it was held, in *Heath* v. *Crealock* (*s*), that a recital in a deed of conveyance, that the grantor's estate was "free from incumbrances" did

(*p*) 1 Show. 56, case 52; see also Vin. Ab. Estop. (P); Com. Dig. Estop. (A 2); *Willoughby* v. *Brook*, 2 Cro. Eliz. 756; *Hart* v. *Buckminster*, Aleyn's Rep. 52; *Rainsford* v. *Smith*, Dyer 196 *a*, note; *Strowd* v. *Willis*, 1 Cro. Eliz. 362; *Shelley* v. *Wright*, Willes, 9; *Hayne* v. *Maltby*, 3 T. R. 438; *Oldham* v. *Langmead*, 3 T. R. 439; *Doe* d. *Butcher* v. *Musgrave*, 1 M. & G. 625; *Lainson* v. *Tremere*, 1 A. & E. 792; *Hill* v. *Manchester & Salford Water Works Co.*, 2 B. & Ad. 544; *Horton* v. *Westminster Improvement Commissioners*, 7 Ex. 780.

(*q*) *Kepp* v. *Wiggett*, 10 C. B. 35.

(*r*) 2 B. & Ad. 278.

(*s*) L. R. 10 Ch. App. 30; see also per Jessel, M.R., in *General Finance Co.* v. *Liberator Building Society*, L. R. 10 Ch. D. 15, at p. 30.

not create an estoppel, so as to prevent the grantor denying that he had the legal estate.

The following are instances in which a statement contained in a recital in a deed has been held to be binding.

In an action against an executor on a bond given by him for the payment of a legacy, it having been recited in the bond that testator gave so much by his will, held, that defendant was estopped from pleading that he revoked that will, and made another last will (*t*).

A recital in a freehold lease, that the lands "are now in the occupation and tenure of the lessee and his undertenants," was held to estop the lessor from contending that the lessee was not in possession, and therefore from denying that livery of *seisin* was unnecessary (*u*).

In an action by an administrator on a covenant in a mortgage deed executed by the intestate, a recital in a subsequent mortgage deed made between the intestate and a third party, A. (not a party to the action), to the effect that A. had agreed to convey the premises to the intestate free from incumbrances, was held conclusive against plaintiff, that the first mortgage had been paid off at the date of such subsequent mortgage deed (*x*).

A bond was conditioned for the payment of £170 as the rent of certain premises, and it was recited in the condition of the bond that the premises were demised by indenture at a certain specific rent as by the said indenture mentioned. In an action on the bond against the

(*t*) *Backwell* v. *Bardue*, 1 Mod. 113.

(*u*) *Rees* d. *Chamberlain* v. *Lloyd*, Wightwick, 123.

(*x*) *Jones* v. *Williams*, 2 Stark. 52.

obligor, held, that he was estopped by the recital from pleading that the rent reserved by the indenture was £140, and not £170, and that the former sum, and not the latter, had always been paid (*y*).

The tendency, however, of modern authority on estoppels of this kind is certainly to restrict them within as narrow limits as possible (*z*).

In considering the effect of a recital, or of any estoppel arising from a deed, it is necessary to look to the intention of the parties, and to the general tenor of the deed, in fact, to interpret the deed (*a*). Thus, a recital of a particular fact only estops both parties to an indenture where it is intended to be the agreement of the parties to admit such fact; and it is a question of construction whether the recital was so intended. For instance, by indenture between plaintiff and defendant, reciting, *inter alia*, that defendant had advanced money to O. on the security of certain deeds, and that defendant was interested in those deeds to that extent, and that it had been agreed that plaintiff should make further advances to O., and that defendant should assign the deeds and his interest therein to plaintiff as a security, defendant assigned them to plaintiff, and convenanted that the

(*y*) *Leinson* v. *Tremere*, 1 A. & E. 792. Lord Denman, C.J., in *Bowman* v. *Taylor*, 2 A. & E. 278, speaks of the above case as "as strong a case as can be conceived." See also *Guardian Assurance Co.* v. *Aronmore*, 6 Ir. Rep. Eq. 391.

(*z*) Per M.R. in *General Finance Co.* v. *Liberator Building Society*, L. R. 10 Ch. D. 15.

(*a*) *South Eastern Railway Co.* v. *Warton*, 6 H. & N. 520; and per Brett, L.J., in *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188; and *ante*, p. 216. And see Bac. Ab. Tit. Leases and terms of years, L. 3, vol. iv., 836, citing Bro. Ab. Tit. Lease, 13.

money so advanced to O. by defendant was due and unsatisfied. In an action on the deed, assigning as breach that the money was not due at the time of making the covenant, it was held that the recital that the money had been advanced was to be taken as the language of defendant only, and therefore did not estop plaintiff from showing that it had not really been advanced (*b*).

And the mere fact of a state of things appearing by legal inference from a statement contained in a deed, does not estop the parties from denying that such a state of things actually existed, if the estoppel would operate in a manner contrary to the intention of the parties, and to the whole scope and tenor of the deed (*c*). Moreover, no estoppel arises from the recital in a deed of matter which is foreign to the contract between the parties (*d*). And the effect of a recital in a deed may be done away with by a subsequent agreement between the parties, even by parol (*e*). But a recital in a deed may restrain the effect of statements in the operative part of the deed. Thus the operation of the words of the release and receipt for the consideration money, though contained in the body of the deed, may be restrained by the recitals in the deed, if they show that the money has not been paid (*f*).

(*b*) *Stroughill* v. *Buck*, 14 Q. B. 781.

(*c*) Judgment of Kelly, C. B., in *Morton* v. *Woods*, L. R. 4 Q. B. 293, explaining *Jolly* v. *Arbuthnot*, 28 L. J. Ch. 547; see also *Dancer* v. *Hastings*, 4 Bing. 2.

(*d*) *Kepp* v. *Wiggett*, 10 C. B. 35; *Doe* d. *Shelton* v. *Shelton*, 3 A. & E. 265; *Fraser* v. *Pendlebury*, 31 L. J. C. P. 1; *Gillett* v. *Abbott*, 7 A. & E. 783; and Vin. Ab. Estop. pp. 153 *et seq.*

(*e*) Per Mellish, L. J., in *ex parte Morgan*, *in re Simpson*, L. R. 2 Ch. D. 72, at p. 89.

(*f*) *Lampon* v. *Corke*, 5 B. & Ald. 606; *Abner* v. *George*, 1

The above rule, that the general tenor of the deed, and the intention of the parties, should be looked to, together with the rule that no estoppel can arise on matters that are immaterial (*g*), serves to explain the *ratio decidendi* of some of the older cases, in which it was held that there could be no estoppel by a mere recital. For, where a recital was necessary to interpret the meaning of the body of the deed, it became material, and created an estoppel (*h*).

Moreover, a recital which recited a mistake of fact, did not, it appears, even at common law, create an estoppel with respect to that fact, contrary to the intention of the parties (*i*), and certainly not in equity (*k*). Thus, where there was a mistaken recital in a settlement, that a mortgage was for £1,200 instead of £1,400, but in subsequent deeds, executed by the parties, and proved in evidence, the mortgage was recognized as being for £1,400, it was held that the Court would treat the settlement as having been made subject to a mortgage

Camp. 392; *Legh* v. *Legh*, 1 B. & P. 447; *Hickey* v. *Burt*, 7 Taunt. 42; *Jones* v. *Herbert*, 7 Taunt. 421; *Payne* v. *Rogers*, 1 Dougl. 407. And see further as to whether a statement in a deed after the words "In Witness, &c.," operates as a recital, so as to estop a party proved to have executed the indenture from denying the execution by the others, *Pearce* v. *Morrice*, 2 A. & E. 84; Com. Dig. Fait. (E 2).

(*g*) See *ante*, p. 7.

(*h*) 2 Leon. 11, pl. 17; see also per Clench, J., in *Severn* v. *Clerk*, 1 Leon. 122, pl. 164, who says, "The recital of itself is nothing; but, being joined and considered with the rest of the deed, it is material."

(*i*) *Rawlins' Case*, Jenkins' Rep. (sixth cent.), case XLVI., p. 254; and *Rare* v. *Huntingdon*, Vaughan's Rep. 82.

(*k*) *Brooke* v. *Haymes*, L. R. 6 Eq. 25.

for £1,400, without any suit to rectify it (*l*). And, in a more recent case, where E. had executed a mortgage deed, which he believed to be in common form, but which contained an erroneous recital that E. was a member of a building society, and subsequently the building society went into liquidation, and E.'s name was placed on the list of contributories, it was held that the mortgage deed did not represent the real transaction between the parties, and that E.'s name must be removed from the list of contributories (*m*). If, however, the recital is conclusive at law, and it is sought to rectify the deed in equity on equitable grounds, the evidence tendered to contradict the recital must be of a direct and conclusive character (*n*).

Besides the instances given above, there are certain exceptions to the rule that a recital of a particular fact in a deed is binding, in the case of certain persons who are incapacitated, or temporarily disabled, by law from contracting; *e.g.*, in the case of infants, married women, lunatics, or persons under duress (*o*).

Conditions in bonds.—The same principles apply with

(*l*) *Scholefield* v. *Lockwood*, 33 L. J. Ch. 106.

(*m*) *Empson's Case*, L. R. 9 Eq. 597; and by the Judicature Act, 1873, sec. 25, sub-sec. 11, in case of conflict between the rules of equity and common law on the same matter, the rules of equity are to prevail.

(*n*) *Ex parte Morgan, in re Simpson*, L. R. 2 Ch. D. 72 & 91.

(*o*) Bro. Estop. 49. But, if a single woman executes a bond in which it is recited that she is a *feme covert*, it nevertheless binds her. See *Rawlins' Case*, Jenkin's Rep. (sixth cent.), case XLVI., p. 254; presumably upon the principle that no one can set up his own wrong to invalidate his own deed.

regard to estoppels arising from conditions in bonds as from recitals. Thus, a general condition in a bond raises no estoppel, but a particular condition does (*p*). And the condition, in order to raise an estoppel, must not be executory (*q*).

There is another rule relating to estoppels by deed, which may be stated thus: a person is not estopped, by executing a deed, from denying any statement therein contained, in a subsequent action between the parties which is not founded on the deed, or brought to enforce the right arising out of it, but which is wholly collateral to it. Thus Parke, B., in *Carpenter* v. *Buller* (*r*) says, "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital By his contract, on the instrument itself, a party is assuredly bound, and must fulfil it. But there is no authority to show that a party to the

(*p*) 1 Ro. Ab. 872, 873 *b*, estop. (P); *Doddington's Case*, Co. Rep., vol. i., p. 519; *R.* v. *Perserall*, 1 Rolle's Rep. 430; and see further as to estoppels arising from conditions in bonds, *Jewell's Case*, 1 Rolle's Rep. 408; *Fletcher* v. *Farrer*, 1 Rolle's Rep. 83; *Fitch* v. *Bissie*, Brownsl. & Goldesb. Rep. 57; *Cullingworth's Case*, Godbolt, 177; *Paine* v. *Skeltrom*, Style, 17; *Rainsford* v. *Smith*, 2 Dyer, 196 *a*; *Hudland* v. *Povy*, 1 Levinz, 3; *Paramoure* v. *During*, Moore, 420; *Skipwith* v. *Steed*, 2 Cro. Eliz. 769; *Karne* v. *Prather*, Cro. Jac. 1, 375; *Holloway's Case*, 1 Mod. 46; *Boverton* v. *Evans*, Vin. Ab. Estop. p. 466, and D'Anvers' Ab., vol. iii., 269; *Hosier* v. *Searle*, 2 B. & P. 299.

(*q*) *Germin* v. *Randal*, Noy's Rep. 79.

(*r*) 8 M. & W. 209.

instrument would be estopped, in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the facts as admitted."

Thus A. is party to a deed of transfer of mortgage from B. to C. In a subsequent action by A. against B. for money had and received (the money in question being part of the consideration for the transfer), A. is not estopped by a recital in the deed of transfer to the effect that the money was due and owing to B., from showing that the money was not in fact due to B. at the time it was paid (*s*).

A. and B. were in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by deed, which recited that it had been agreed that the business of a paper manufacturer should belong exclusively to B. and the business of an iron merchant to A., but that A. should receive out of the stock, paper to the value of £898. 4*s*. 11*d*. which should remain in the paper mill for a year, at his option. It was also recited in the deed, that in performance of that arrangement, paper to the value of £898. 4*s*. 11*d*. had been delivered to A. and that the same was then in the mill, as A. acknowledged. It was then witnessed, that, in performance of the arrangement, A. and B. dissolved partnership, and A. assigned to B. the stock-in-trade of the business of a paper manufacturer, except the £898. 4*s*. 11*d*. worth of paper so delivered to A., as aforesaid, and B. assigned to A. the business of an iron merchant. No paper whatever having been set apart or delivered to A., A. brought an action of trover for the paper against B. Held that,

(*s*) *Fraser* v. *Pendlebury*, 31 L. J., C. P. 1.

as the action was brought to enforce rights arising out of the deed and was not wholly collateral to it, B. was estopped by the deed from saying that the paper had not been delivered to A. (and consequently that an action of trover was not maintainable therefor) (*s*).

Estates by estoppel.—One result of the rule that a man is not permitted to dispute his own deed is, that if A. leases premises to B. by indenture, A. having at the time no title to the premises comprised in the lease, on the one hand B. is estopped from disputing A.'s title to the premises at the time when he leased them (*t*); and, on the other hand, A., and those claiming under him, are estopped from disputing that a good title to the premises passed to B. under the indenture (*u*). The title obtained by the lessee in such a case, is called an estate or title by estoppel. The advantage of such an estate is that if, at any subsequent time, during the continuance of the lease, the lessor, or those claiming under him, acquires an actual beneficial title to the premises in question, he or they are considered in law as having made good the lease to the lessee, and as having conferred upon him a bene-

(*s*) *Wiles* v. *Woodward*, 5 Ex. 557; see also *Carter* v. *Carter*, 3 K. & J. 645; *South Eastern Rail. Co.* v. *Warton*, 6 H. & N. 520, *ante*, pp. 216, 219; *Ex parte Morgan, In re Simpson*, L. R. 2 Ch. D. 72; *Cracknall* v. *Janson*, L. R. 11 Ch. D. 1; *Burnand* v. *Rodocanachi*, L. R. 7 App. Cas. 335.

(*t*) *Strood* v. *Willis*, 1 Cro. Eliz. 362; *Palmer* v. *Ekins*, 2 Str. 817; *Thorp and Wingfield's Case*, 3 Leon. 203.

(*u*) A similar rule existed, in the case of a fine levied by a person having no interest in the premises the subject of the fine. See *Sir G. Brown's Case*, Co. Rep., vol. ii., pp. 138, 165; *Helps* v. *Hereford*, 2 B. & Ald. 242. And a similar rule exists in the case of estoppels generally, but is most frequently exemplified in estoppels by deed. See Smith's L. C. (8th ed.), vol. ii., p. 877.

ficial title to the premises, to which before he had only a title by way of estoppel. This is what is meant by the rule, that an interest when it accrues feeds the estoppel. This result only occurs when the original title conferred upon the lessee by the indenture, took effect by way of estoppel and estoppel only. If any quantum of interest whatever passed out of the lessor to the lessee at the time of the execution of the indenture, the lease would be said to take effect by way of interest, and not by way of estoppel, and this is what is meant by the rule that there is no estoppel where an interest passes. In such a case, consequently, the doctrine of feeding the estoppel would not apply, even if the lessee did not acquire under the indenture all that he bargained for, and the lessor, or those claiming under him, acquired, during the continuance of the lease, an additional interest in the premises. The following authorities will serve to explain and illustrate the above rules. The principle is explained by Lord Coke as follows :—"A., lessee for the life of B., makes a lease for years by deed indented, and afterwards purchases the reversion in fee. B. dies. A. shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. But, if A. had nothing in the land, and made a lease for years by deed indented, and after purchase the land, the lessor is as well concluded as the lessee, to say that the lessor had nothing in the land; and here it works only on the conclusion, and the lessor cannot confess and avoid as he might in the other case" (*y*).

(*y*) Co. Litt. 47 *b*; see also *Rawlins's Case*, Co. Rep., vol. ii., p. 419; *Style* v. *Hearing*, Cro. Jac. 1, 73; and *London's Case*,

The estoppel only arises in the case of a lease by indenture, and not in the case of a lease by parol, or by deed poll (*z*). And it does not operate, as between the lessor and a third party, a stranger to the lease (*a*). It however binds the lessor, and all those claiming under him (*b*). Thus, if A. leases by indenture to B., for say six years, having nothing in the land, and afterwards acquires an interest in the land and leases to C. by indenture for say twenty-one years, C. is bound by the estoppel, and takes only an interest in futuro, unless B. attorns tenant to him (*c*). But it appears doubtful whether the estoppel would bind them, as against an assignee of the lessee. For, according to an old authority, an assignee of the lessee cannot take advantage of a lease by estoppel, nor can he bring an action on the covenants contained therein (*d*).

In order for the estoppel to arise, the lease must be of the land itself; a lease of the herbage only, will not suffice (*e*). And the indenture must contain some precise description of the parcels (*f*).

Anderson, 128, where the same principle is applied to the case of a man taking a lease for years, by deed indented, of his own land.

(*z*) Bro. Ab. Tit. Confess. & Avoid. pl. 3, citing Littleton, Tit. Tenant for years; Co. Litt. 47 *b*; Brooke's New Cases, p. 108.

(*a*) *Ferrers* v. *Borough*, 2 Cro. Eliz. 665.

(*b*) *Edwards* v. *Omelhallum*, March. 64.

(*c*) *Rawlins's Case*, as cited in *Weale* v. *Lower*, Pollexfen, 68; Vin. Ab. Estop. p. 162. If, however, B. attorns tenant to C., this will create a reversion by estoppel in C. to B.'s lease, to which the rent on B.'s lease will be incident, and recoverable by C. in *præsenti*. *Rawlins's Case* as reported in Jenkins's Rep. (sixth cent.), Case XLVI., p. 254; *Palmer* v. *Ekins*, 2 Lord Raymond, 1550.

(*d*) *Noke* v. *Awder*, 1 Cro. Eliz. 436; see, however, per Tindal, C. J., in *Webb* v. *Austin*, 7 M. & G. at p. 724.

(*e*) Co. Litt. 47 *b*.

(*f*) *Rawlins's Case*, Jenkins's

So the lease will not take effect by way of estoppel, if the fact that the lessor had nothing in the lands, appears on the face of the indenture of lease itself by recital or otherwise. Thus where a church was during the incumbent's lifetime appropriated in futuro to a body corporate, and the said body corporate, reciting that fact, made a lease by indenture, to take effect during the life of the incumbent, held, that the lease did not take effect by way of estoppel, but was void (*g*). The estoppel only continues during the term created by the indenture (*h*). The estoppel arises by virtue of the indenture. Thus, it appears, that formerly, if a man took a lease for life by indenture of his own land, no estate by estoppel would be created, as such a lease formerly took effect by force of the livery and not of the deed: but it would have been otherwise if he were to have taken a lease for years (*i*). So also, if a copyholder of inheritance took a lease for years from his lord, he was estopped from claiming the inheritance, but not so if he took a lease for life (*k*).

An estate by estoppel runs with the land, and binds all those into whose hands the land comes by descent or otherwise, and whether they be heirs or assignees (*l*).

Rep. (sixth cent.), Case XLVI., p. 254.

(*g*) *Ibid.*

(*h*) *Rawlins's Case*, Co. Rep. vol. ii., p. 419; *Style* v. *Hearing*, Cro. Jac. 1, 73; *London's Case*, Anderson, 128; *Webb* v. *Austin*, 7 M. & G. at p. 724.

(*i*) *Anon. Case*, Gouldsb. 53, Case 5; but the judges were not unanimous. See also Vin. Ab. Estop. p. 462.

(*k*) Vin. Ab. Estop. p. 461, citing *Southcot* v. *Adams*, cited also in *Belfield* v. *Adams*, 3 Bulstr. 81.

(*l*) 1 Ro. Ab. 871 (N), pls. 2, 5; Co. Litt. 12 *a*, 47 *b*, 48 *a*; *Rawlins's Case*, Co. Rep., vol. ii., 54 *a*; *Palmer* v. *Ekins*, 2 Str.

On the other hand if a man having nothing in the land leases by indenture, he has, unless the lease be of such a nature that no reversion remains in the lessor (*m*), a reversion by estoppel, which is assignable to a third party (*n*); except perhaps in cases where the indenture of lease itself discloses the fact that the lessor has no legal estate (*o*). And such reversion is presumed to be a reversion in fee simple, until the contrary is shown (*p*). This applies also in the case of a demise by indenture by a person having only an equitable estate, if it operates by way of estoppel. Thus if a mortgagor in possession grants a lease, and then assigns his equity of redemption to a third person, who sues the tenant on a covenant to repair contained in the said lease, the latter would be estopped from denying that the lessor had such a legal estate as would warrant the lease (*q*). Finally, if a lessee by estoppel subsequently acquires the legal estate, his estate by estoppel takes precedence of his estate

817; *Trevivian* v. *Lawrence*, 1 Salk. 276; and an estoppel which bound the estate, *i.e.*, ran with the land, was not unfavoured in equity. See *Weale* v. *Lower*, Pollexfen. 67.

(*m*) *Poultney* v. *Holmes*, 1 Str. 404; *Preece* v. *Corrie*, 5 Bing. 25; *Pollock* v. *Stacy*, 9 Q. B. 1033.

(*n*) *Cuthbertson* v. *Irving*, 4 H. & N. 742; in error, 6 H. & N. 135.

(*o*) *Pargeter* v. *Harris*, 7 Q. B. 708; *Disney* v. *Butler*, 2 Hud. & Br. 499, cited in 2 Wms. Saund. (ed. 1871), pp. 829 *et seq.*

(*p*) *Cuthbertson* v. *Irving*, 4 H. & N. 642; in error, 6 H. & N. 135; notes to *Walton* v. *Waterhouse*, 2 Wms. Saund. (ed. 1871), pp. 829 *et seq.*, citing *Sturgeon* v. *Wingfield*, 15 M. & W. 224.

(*q*) *Cuthbertson* v. *Irving*, 4 H. & N. 742; in error, 6 H. & N. 135; *Gouldsworth* v. *Knights*, 11 M. & W. 343, explaining *Whitton* v. *Peacock*, 2 Bing. N. C. 411; see also *Church* v. *Dalton*, 2 Ir. C. L. R. 219, where the authorities are discussed.

under the assignment, &c. For instance, if a mortgagor leases by indenture, and afterwards procures the money to be repaid, and an assignment to be made by the mortgagee to the lessee, the lessee's title to the lease by estoppel, takes precedence of his title under the assignment from the mortgagee (*r*).

There is no estoppel where an interest passes (*s*).—The following instance is given by Lord Coke: A. lessee for the life of B., makes a lease for years by deed indented, and after purchases the reversion in fee. B. dieth. A. shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B. (*t*).

In order however for the estate to be vested in the grantee by way of interest, and not by way of estoppel, it is not essential that the grantor should convey the actual interest which he has in the estate, for if he grant a larger interest than he is entitled to, still as some interest passes by the conveyance, though it be for a shorter period than he intended and the conveyance professes to grant, it is sufficient (*u*).

Thus A., tenant for life, conveyed to trustees to the use of himself for life, remainder to B. for life, remainder to C. in fee. A. died, and C. brought an action of waste against B. B. was not estopped from showing that A.

(*r*) See a case cited in *Whaley* v. *Anderson*, Keble, 876.

(*s*) *Treport's Case*, Co. Rep., vol. iii., p. 285; *Andrew* v. *Pearce*, 1 B. & P. N. R. 158; *Doe* d. *Strode* v. *Seaton*, 2 C. M. & R. 728; *Walton* v. *Waterhouse*, 2 Wms. Saund. (ed. 1871), p. 829.

(*t*) Co. Litt. 47 *b*.

(*u*) 2 Wms. Saund. (ed. 1871), pp. 829, 830.

the grantor was only tenant for life, and that upon his death the limitations in the conveyance determined. For in this case some interest passed under the conveyance to B. and C. as well as to A. For if A. had committed a forfeiture of his estate, B. might have entered and held the estate during A.'s lifetime; and so might C. or his heir if B. were, after his entry, to commit a forfeiture or die during A.'s lifetime (*x*).

But in order that some interest may pass to the lessee under the indenture, the estate out of which the lease for years is carved must be some greater estate in law than the term of years itself (*y*). Thus, if a tenant for life leases by indenture for 1000 years, the lease takes effect by way of interest, and not by way of estoppel, because a freehold estate is a greater estate in law than any term; and so, if the tenant for life subsequently purchases the reversion and dies, his heir may avoid the lease, as it took effect by way of interest. But if a tenant, say for 20 years, makes a lease by indenture for 1000 years, this takes effect by way of estoppel, and if the lessor subsequently purchases the fee simple in the land, the lease binds him and his heirs (*z*). However, even if a lease takes effect by way of interest, there will be a mutual estoppel between lessor and lessee during the continuance of the term actually created, but no longer; but this estoppel arises from the relationship of landlord and tenant

(*x*) 2 Wms. Saund. (ed. 1871), p. 830.

(*y*) *Gilman* v. *Hoare*, 1 Salk. 275; reported as *Holman* v. *Hore*, 3 Salk. 151.

(*z*) *Rawlins's Case*, as reported in Jenkins's Rep. (sixth cent.), case XLVI., p. 254; and *Anon. Case*, Moore, 30.

between them (*a*). The estoppel arising between landlord and tenant will be discussed in the following chapter.

In consequence of the rule that a lease by indenture takes effect by way of interest if the estate out of which it is carved is a greater estate in law than the term itself (*b*), in an action by the lessor, or those claiming under him against the lessee in respect of anything arising out of the lease, for instance for breach of covenants contained in the indenture of lease, the lessee would not be estopped from traversing any particular estate of the lessor in the land, so long as he did not assert either that the lessor had no estate in law, or that he had an estate which was a smaller one in law than the term of years in question. For instance, in such an action, if lessor claimed as tenant in fee, the lessee would not be precluded from showing that he was only tenant for life (*c*), or that he was only seised in respect of his wife for her life, and that she died before any breach of covenant occurred (*d*).

Certain instances are given in the older authorities, showing when a lease by indenture operates by way of interest, and when by way of estoppel. "Thus," says Lord Coke, "if tenant of the land and a stranger

(*a*) *Treport's Case*, Co. Rep., vol. iii., p. 285.

(*b*) *Gilman* v. *Hoare*, 1 Salk. 275; reported as *Holman* v. *Hore*, 3 Salk. 151.

(*c*) *Brudnell* v. *Roberts*, 2 Wils. 143; see also *Carrick* v. *Blagrove*, 1 B. & B. 531; *Weld* v. *Baxter*, 11 Ex. 816; affirmed in error, 1 H. & N. 568.

(*d*) *Blake* v. *Foster*, 8 T. R. 487; *Hill* v. *Saunders*, 7 D. & R. at p. 24.

join in a lease for years by indenture, this is the lease only of the tenant, and the confirmation of the stranger, and yet the lease as to the stranger operates by way of conclusion" (*e*). Again, if baron and feme lease for years by indenture, rendering rent, where the baron had all the estate in the land and the feme nothing, this does not as to the feme operate by way of conclusion (*f*). Hence it appears that if a married woman leases, or joins in making a lease, having nothing in the land, no lease by estoppel would be created; for estoppels by deed must be mutual (*g*). Again, if A. is seised of 10 acres, and B. of other 10 acres, and they join in a lease for years by indenture, the indenture operates not by conclusion but by interest, so also if two tenants in common join in a lease for years by indenture (*h*). But if two joint tenants in fee or for life, join in a lease for years by indenture, reserving rent to one only of them, this enures to him only by estoppel, by force of the indenture (*i*).

A lease may operate by way of estoppel, even if it commences by way of interest, if the lessor's interest is, at the time of his making the lease, defeasible and is afterwards actually defeated (*k*). And on the other hand, a lease may commence by way of estoppel, and

(*e*) Co. Litt. 45.

(*f*) *Brereton* v. *Evans*, 2 Cro. Eliz. 700.

(*g*) *Ludford* v. *Barber*, 1 T. R. 90.

(*h*) Co. Litt. 45 *a*; *Craddock* v. *Jones*, Brownl. & Gold. pp. 39, 40, 134; *Mantle* v. *Wollington*, Cro. Jac. 166; Vin. Ab. Estop. p. 482; *Beer* v. *Beer*, 12 C. B. 81.

(*i*) Co. Litt. 47.

(*k*) Vin. Ab. Estop. p. 483, citing *Paulin* v. *Hardy*, Skinner. 2, 3.

operate afterwards by way of interest. Thus if A. leases by indenture to B. for 40 years, and a year afterwards leases by indenture to C. for 40 years, the lease to C. will operate for the first 39 years by way of estoppel, and for the last year will take effect by way of interest (*l*).

An interest when it accrues feeds the estoppel.—This is explained in the case of *Doe d. Christmas* v. *Oliver* (*m*) to mean, that if A. binds himself by estoppel or conclusion as long as a certain contingency continues, when the contingency happens, the estate by estoppel becomes an estate in interest, of the same effect as if the contingency had happened before A. bound himself. The principle is stated by Tindal, C. J., in *Webb* v. *Austin* (*n*) as follows: "It (*i.e.* the indenture of lease), first operates by way of estoppel, and finally when the grantor obtains an ownership, it attaches on the seisin, and creates an interest, or produces the relation of landlord and tenant; and there is a term commencing by estoppel, but for all purposes it becomes an estate or interest. It binds the estate of the lessor, &c., and therefore continues in force against the lessor, his heirs, &c. It also binds the assigns of the lessor and of the lessee. If one makes a lease for years by indenture, of lands wherein he hath nothing at the time of such lease made,

(*l*) *Gilman* v. *Hoare*, 1 Salk. 275; reported as *Holman* v. *Hore*, 3 Salk. 151.

(*m*) 10 B. C. & 181; Smith's L. C. (8th ed.), vol. ii., 773. See also Hal. MSS., Co. Litt. (Hargr. & Butler's ed.), 47 *b*, note 307; *Isham* v. *Morrice*, Cro. Car. 109; *Walton* v. *Waterhouse*, 2 Wms. Saund. (ed. 1871), p. 829.

(*n*) 7 M. & G. at p. 724, citing Preston on Abstracts, and Bac. Ab. Tit. Leases (O); see also *Gouldsworth* v. *Knights*, 11 M. & W. 337; *Purgeter* v. *Harris*, 7 Q. B. at p. 728.

and after purchases those very lands, this shall make good and unavoidable his lease, as well as if he had been in the actual possession and seisin thereof at the time of such lease made."

Thus A., a contingent remainderman in fee, granted a lease to B. by fine and indenture. After A.'s death the contingency happened, and his heir entered. Held, that the estate which came to the heir on the happening of the contingency, fed the estoppel, and that the estate by estoppel, then became an estate in interest, and had the same effect as if the contingency had happened before the fine levied (*o*). An heir apparent conveyed, during the life of his ancestor, an estate which afterwards descended upon him. Held, that he was estopped from saying that he had no interest at the time of the conveyance (*p*). In 1742 land was demised by the Broderers' Company to F. for 100 years, with a covenant for perpetual renewal. In 1827 the residue of this term had become vested in H. who in that year assigned it by way of mortgage, with proviso for redemption. In 1828 H. demised the land by indenture for 21 years to plaintiff. In 1836 the mortgagees and H. surrendered the premises to the company, who forthwith demised them to H. for 100 years. Shortly afterwards the unexpired residue of this term of 100 years, and all the estate and interest of H. in the premises,

(*o*) *Weale* v. *Lower*, Pollexfen, 55; see also *Vick* v. *Edwards*, 3 P. Wms. 372; *Doe* v. *Martyn*, 8 B. & C. 527; *Davies* v. *Bush*, 1 McClel. & Y. 58; Fearne, 365.

(*p*) *Hague* v. *Maltby*, 3 T. R. at p. 441. The same rule would apply if he levied a fine of the lands. See *Edwards* v. *Rogers*, Sir W. Jones, 756; *Wright* v. *Wright*, 1 Ves. Sen. 412

were assigned to defendant. Subsequently plaintiff brought an action against defendant for breach of covenants contained in the lease for 21 years. Defendant pleaded, 1st. That H. did not demise to plaintiff, 2nd. That the reversion on the term of 21 years did not vest in defendant. Held, that both these issues should be entered for plaintiff; for that the lease for 21 years, being by deed, was a good demise by estoppel, and that a reversion in H. by estoppel was thereby created, which *primâ facie* was a reversion in fee, and consequently was not surrendered to the company, but passed to defendant. *Per* Parke, B., "All the reversion of H. which was a reversion by estoppel, passed to defendant. This estoppel was fed by the demise for 100 years from the Broderers' Company to H., and thereby the lease from him to plaintiff became good in point of interest" (*q*).

The above doctrine however does not seem to have been regarded favourably in equity, for, even after the Statute of Uses, a *cestui que use* could not take advantage of it. Thus where A., made a feoffment by deed indented to B. of Blackacre in which he had nothing, to the use of C. and the heirs of his body, remainder to B. and his heirs, and afterwards purchased Blackacre, C. was not allowed to take advantage of the above doctrine (*r*). Moreover, the above doctrine does not apply so as to bind persons who, after improperly, and even fraudulently, making a conveyance of property to which they are not entitled, subsequently acquire the legal estate

(*q*) *Sturgeon* v. *Wingfield*, 15 M. & W. 224; see also per Martin, B., in *Cuthbertson* v. *Irving*, 4 H. & N. at p. 754.

(*r*) See a case in Freeman's Rep., p. 475, pl. 651.

as trustees only. Thus, where A., as lessee under a fictitious lease of freeholds from a fictitious freeholder, mortgaged it by sub-demise to B., and subsequently acquired the legal estate in the freehold as trustee for C., who was a confederate with him in granting the fictitious lease; held, that the mortgage by sub-demise was not perfected by estoppel through the acquisition by A. of the legal estate, so as to confer a title upon the mortgagee as against a subsequent purchaser for value (*s*). *Per* Bacon V. C. (at p. 577), "There is no case in which a trustee, having made a fraudulent representation by which he is bound, or even a fraudulent conveyance, when he got his legal estate, but still remaining a trustee, was so estopped as to deprive the persons beneficially entitled to the estate which was theirs, and of which he was the trustee, and trustee only." And further, the doctrine does not apply in cases where the interest from which it is sought to feed the estoppel, arises from a conveyance which was obtained fraudulently, and which the Court would order to be cancelled (*t*).

Finally, the doctrine does not apply to the surrender of copyholds. Thus, it has been held that no estate by estoppel arises from the surrender of copyholds in which the surrenderor had no estate at the time of the surrender, but which descended to him subsequently to the surrender, so as to bind his heir at law (*u*). And

(*s*) *Keate* v. *Phillips*, L. R. 18 Ch. D. 560.

(*t*) See remarks of Bacon, V.C., *Heath* v. *Crealock*, L. R. 18 Eq. 215; on appeal in L. R. 10 Ch. App. 22.

(*u*) *Goodtitle* v. *Morse*, 3 T. R. 371; *Roe* v. *Hicks*, 2 Wils. 13.

devisees of contingent remainders in copyholds, not being in the seisin, cannot make a surrender, so as to bind either the parties or their heirs by estoppel (*x*). For no estoppel that runs with the land (*y*), and in fact it appears no estoppel at all (*z*), arises from the surrender of copyholds ; and unless such surrender is valid at the time, no estate passes thereunder into the hands of the lord of the manor (*a*).

(*x*) *Doe* d. *Blacksell* v. *Tomkins*, 11 East, 185.

(*y*) *Morse* v. *Faulkner*, 1 Anstr. 11 ; 3 Swanst. 429.

(*z*) *Taylor* v. *Phillips*, 1 Ves. Sen. 230 ; *Doe* v. *Wilson*, 4 B. & Ald. 303 ; *Doe* d. *Baverstock* v. *Rolfe*, 3 N. & P. 648.

(*a*) *Taylor* v. *Phillips*, 1 Ves. Sen. 230.

CHAPTER VIII.

LANDLORD AND TENANT.

The term estoppel in pais, according to Lord Coke, originally meant an estoppel arising from "matter in the country," as distinguished from an estoppel arising from "matter in writing" (*a*). The instances which Lord Coke gives of estoppels of this kind, are (1) by liverie, (2) by entry, (3) by acceptance of rent, (4) by partition (*b*), and (5) by acceptance of an estate (*c*).

The following remarks are made by Parke, B., in his judgment in *Lyon* v. *Reed* (*d*): "The acts in pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences

(*a*) Co. Litt. 352 *a*, 352 *b*; *ante*, p. 4.

(*b*) For instances of estoppels by partition, see Co. Litt. 170 *a*, 170 *b*, *et seq.*

(*c*) See Moore, p. 679, Tit. Dower, pl. 928.

(*d*) 13 M. & W. at p. 305.

followed." The above classification does not, however, include the more modern estoppels in pais, or equitable estoppels as they are sometimes called (*e*), but the present chapter deals with those cases of estoppel which are most nearly connected with Lord Coke's enumeration, viz., the estoppel subsisting between landlord and tenant. Certain cases of estoppel between landlord and tenant, have indeed already been cited in the chapter on Estoppels by deed, but in those cases the foundation of the estoppel was the deed itself, and not the particular relationship of landlord and tenant.

In dealing with this branch of estoppel in pais, Bigelow, in his work on Estoppel, makes the following observations (*f*): "The origin and character of the modern estoppel of the tenant, is to be found in the ancient action of assumpsit for use and occupation. In this form of action what was sought to be recovered was, not technically rent, but compensation from day to day for actual enjoyment. But to the maintenance of the action the relation of landlord and tenant must be established; and, when established, the modern estoppel in pais arises. Enjoyment by permission is the foundation of the action, and is, therefore, the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. . . . Let it, then, be borne in mind that two conditions are essential to the existence of the estoppel: first, possession, secondly, permission; and that

(*e*) Per Lord Selborne in *Citizens' Bank of Louisiana* v. *First National Bank of Orleans*, L. R. 6 H. L. 352, at p. 360.

(*f*) Bigelow on Estoppel (2nd ed.), p. 350.

when these conditions are present the estoppel arises" (*g*). The general principle, that a tenant is estopped from disputing his landlord's title, may be more accurately stated as follows:—

A tenant, whilst in possession, is estopped from disputing that, at the time when he received possession, the landlord from whom he received it had a good title to the premises (*h*).—Thus in *Doe* d. *Knight* v. *Smythe* (*i*), Dampier, J., says: "It has been ruled often that neither the tenant, nor anyone claiming under him, can dispute the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord." Again in *Attorney-General* v. *Hotham* (*j*), Sir Thomas Plumer, M.R., says: "It would be contrary to the principle upon which the relation between landlord and tenant exists, to allow the tenant to dispute his landlord's title: for there is an implied covenant that the landlord shall protect the tenant's enjoyment, and the tenant shall guard the landlord's title."

The principles upon which this estoppel depends are well explained in the case of *Morton* v. *Woods* (*k*), where Lush, J., says (*l*): "Inasmuch as the parties have

(*g*) See also *Doe* d. *Bullen* v. *Mills*, 1 M. & G. at p. 29, where a distinction is drawn between an estoppel by indenture of lease, which ceases with the cesser of the term, and estoppel by acceptance of possession, which continues till that possession has been restored to the party from whom it was received.

(*h*) *Veale* v. *Warner*, 1 Wms. Saunders (ed. 1871), 325, and notes.

(*i*) 4 M. & S. 347.

(*j*) 1 Turn. & Russ. at p. 220.

(*k*) L. R. 3 Q. B. 658; L. R. 4 Q. B. 293; see also *Dancer* v. *Hastings*, 4 Bing. 2; *Jolly* v. *Arbuthnot*, 4 De G. & J. 224.

(*l*) L. R. 3 Q. B. at p. 671.

agreed that they should stand in the relation of landlord and tenant, and the one accordingly receives possession from the other and enters on the premises, so long as he continues in possession he cannot be heard to deny the state of facts which he has agreed shall be taken as the basis of the arrangement: in other words he cannot set up that the landlord has no legal title."

The limits of the above rule are laid down by Park, J., in *Gravenor* v. *Woodhouse* (*m*), as follows: "Of the general rule of law, that a tenant shall not be allowed to question the title of his landlord where he has originally received possession from him and has paid him rent, there is no doubt, ever since the case of *Sylliran* v. *Stradling* (*n*). It always furnishes a strong *primâ facie* case: but to the generality of this rule there are exceptions: for, although on the one hand the general rule is most wise and politic, in not allowing a tenant lightly to use, to his landlord's detriment, that title the possession of which he has entrusted to him; so on the other it is most just so far to guard the tenant, that he may not be carelessly put into the hazardous situation of paying his rent twice over, and being put to the trouble and expense of an action to recover that which he may have been compelled to pay."

The following cases may be cited as illustrating the rule above enunciated:—A. brings an action of replevin against B., to which B. makes a general avowry under 11 G. 2, c. 19, s. 22. A. is precluded from pleading in answer, that B. *nil habuit in tenementis* (*o*).

(*m*) 1 Bing. at p. 42.
(*n*) 2 Wils. 208.
(*o*) *Sylliran* v. *Stradling*, 2 Wils. 208; see also *Parry* v.

B. claiming under A., lets lands for a year to C., and dies, and A. afterwards brings ejectment against C. C. cannot dispute A.'s title (*p*).

A. being in possession of premises, B. distrains on his goods for arrears of rent. A. had never paid rent personally to B., but he did not replevy the goods, and they were ultimately sold to satisfy the rent. Subsequently, B. brings an action against A. for use and occupation of the premises. Held, that A. is precluded from denying B.'s title to the premises (*q*).

A. attorns tenant to B. Several years afterwards B. distrains for rent, and then A. brings an action of replevin against B. B. puts in the attornment. A. is precluded from showing a title derived by him from a third person through whom B. claims (*r*).

A. hires apartments by the year of B. B. afterwards lets the entire house to C., who brings an action for use and occupation against A. Held, that A. cannot impeach C.'s title (*s*).

A., a copyholder, is admitted to a tenement and does fealty to the lord of the manor. He is estopped, in an action against him by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of the admittance (*t*).

A. is in possession of premises under an indenture of

House, Holt's Rep. 188, and note on p. 491.

(*p*) *Barwick* d. *Mayor of Richmond* v. *Thompson*, 7 T. R. 488.

(*q*) *Panton* v. *Jones*, 3 Camp. 372.

(*r*) *Gravenor* v. *Woodhouse*, 1 Bing. 38.

(*s*) *Rennie* v. *Robinson*, 1 Bing. 147.

(*t*) *Doe* d. *Nepean* v. *Budden*, 5 B. & Ald. 626.

lease. B. claiming them by an alleged title adverse to that of the lessor, and prior to the lease, demands them of A., and ultimately obtains possession by paying him a sum of money. The landlord afterwards brings ejectment against B., the term having been forfeited. Held, that B. cannot set up his adverse title against the landlord (*u*).

Defendant took certain premises by agreement, from F. and B., "agents for the trustees of the joint estate of T. and S. B." Plaintiffs subsequently as "trustees of the joint estate of T. and S. B.," sued defendant for use and occupation. It appeared, by plaintiffs' own evidence that at the date of the agreement they were trustees for the estate of S. B. only. Held, that defendant was estopped from taking advantage of the discrepancy (*x*).

A. mortgages in fee to B. C., claiming by anterior title, grants A. a lease. B. brings an action of ejectment against A. A. is precluded from setting up C.'s title (*y*).

A. granted a lease of certain property to B. Subsequently C., who had built a house upon some adjoining waste land, but had never acquired a title to it, gave up possession of it to B., who let it to the defendant at a yearly rent. In an action of ejectment brought by A.'s assignee and B. against defendant, held, that defendant was estopped from denying B.'s title to the said house

(*u*) *Doe* d. *Bullen* v. *Mills*, 2 A. & E. 17; see also *Doe* d. *Manton* v. *Plomer*, 9 Bing. 41; and as to the estoppel on an under-tenant, see *Johnson* v. *Mason*, 1 Esp. 88.

(*x*) *Fleming* v. *Gooding*, 10 Bing. 549.

(*y*) *Doe* d. *Ogle* v. *Vickers*, 4 A. & E. 782; see also *Doe* d. *Hurst* v. *Clifton*, 4 A. & E. 809; *Alchorne* v. *Gomme*, 2 Bing. 54.

and that B. was estopped from denying A.'s title to the same (*z*).

C. H. let certain stamping mills to a mining company from year to year, and subsequently gave a notice to quit to the company, and then brought ejectment against them. Defendant, who was a partner in the company, defended the action on their behalf. Held, that defendant was estopped from disputing the title of C. H., although C. H. had admitted, in an answer in Chancery, which was in evidence, that he had no legal title (*a*).

S., husband of A., being in possession of lands, conveyed them in fee to a purchaser for value: but it was verbally agreed between S. and the purchaser, that during their joint lives the possession of S. should not be disturbed. The purchaser died and S. received notice to quit. S. then died. The notice to quit having expired, and A., the widow, still retaining possession of the premises, ejectment was brought against her by the purchaser's representatives. Held, that she could not set up against them the title of a person to whom her husband, before the said conveyance, had mortgaged them for 1,000 years (*b*).

A., an occupier of certain rooms, devised them to B. C., who had resided in the rooms in A.'s lifetime, for the purpose of attending on him, remained in possession of

(*z*) *Doe* d. *Whible* v. *Fuller*, 1 Tyr. & Gr. 17; see also *Ward* v. *Ryan*, 10 Ir. Rep. C. L. 17; and *Wogan* v. *Doyle*, 12 L. R. Ir. 69. In ejectment, a person defending as landlord is bound by the same estoppels as the tenant in possession; see *Doe* d. *Mauvers* v. *Mizen*, 2 Moo. & R. 56.

(*a*) *Francis* v. *Doe* d. *Harvey*, 4 M. & W. 331.

(*b*) *Doe* d. *Leeming* v. *Skirrow*, 7 A. & E. 157.

them after his death. In an action of ejectment by B. against C., held that C. was precluded from setting up a title adverse to B.'s, as he came in under B.'s devisor (*c*).

N., having no title to certain premises, lets them by parol to A., and receives rent from him. Subsequently another claimant, B., demands the rent; and N., being satisfied with B.'s title, informs A., in B.'s presence, that he had given up the premises to B., who was now the landlord, and that the rent was thenceforward to be paid to B. A. acquiesces, and, upon B. demanding the next quarter's rent, A. pays part of it on account. Held, that A. cannot afterwards set up the title of a third person, who had demanded rent, but had taken no steps to eject him (*d*).

A. occupied premises under B., and paid rent to him as the landlord. In an action for use and occupation brought by B. against A., held, that A. could not allege that B. had only the equitable estate, or that he was entitled only as co-executor with others who did not join in the action, even though B. at the trial disclosed that fact in proving his case (*e*).

A. becomes tenant by agreement of certain premises to B., the devisee of his late landlord, and pays rent to him. In ejectment by B. against A., held, that in the absence of fraud A. could not offer evidence to show that the devise to B. was void by reason of the incapacity of testator (*f*).

(*c*) *Doe* d. *Willis* v. *Birchmore*, 9 A. & E. 662.

(*d*) *Hall* v. *Butler*, 10 A. & E. 204.

(*e*) *Dolby* v. *Iles*, 11 A. & E. 335.

(*f*) *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367.

Tenant for life, under a devise with a leasing power, let to defendant by a lease which did not notice the power. After the death of the lessor, a succeeding tenant for life, under the same devise, brought ejectment against defendant, on the ground that the lease was not a valid execution of the power. Held, that defendant was not estopped from setting up an outstanding term of years in trustees, which was created by a tenant in fee from whom the devisor had inherited (*g*).

A., B. and C. are joint tenants of an estate. A. and B. grant a lease of their shares to C., who enters into exclusive possession of the whole estate. During the continuance of such exclusive possession, C. is estopped from denying his tenancy (*h*).

A., a mortgagor in possession, grants a lease of the premises to B., and then assigns the reversion expectant on the lease to C. In an action of ejectment brought by C. against B., held, that B. was estopped from denying that C. had such a legal estate as would warrant the lease (*i*).

The above rule applies, whether the tenancy is one from year to year, or at will, or by sufferance (*k*). It was at one time, supposed that the rule was limited to the case of an action of ejectment (*l*). But it has been held

(*g*) *Doe* d. *Egremont* v. *Langdon*, 12 Q. B. 711.

(*h*) *Cowper* v. *Fletcher*, 6 B. & S. 464.

(*i*) *Cuthbertson* v. *Irving*, 4 H. & N. 742; 6 H. & N. 135.

(*k*) *Doe* d. *Bailey* v. *Foster*, 3 C. B. 229.

(*l*) *Watson* v. *Lane*, 11 Ex. 772; per Heath, J., in *Ogle* v. *Atkinson*, 5 Taunt. 759; and *Cheesman* v. *Exall*, 6 Ex. 341, where Pollock, C. B. (at p. 341) approves of the judgment in *Ogle* v. *Atkinson*, and Martin, B., (at p. 346) dissents from it. But see also *Delaney* v. *Fox*, 2 C. B. N. S. 768, at p. 777.

to apply also to actions for use and occupation (*m*), of replevin (*n*), and for trespass (*o*); but not, it appears, to actions for the recovery of chattels (*p*); and in an action by a landlord against a tenant for breach of a covenant to deliver up certain fixtures, which had been claimed by and delivered up to the landlord's mortgagee, it was held that the tenant was not estopped from setting up the mortgagee's title to the premises (*q*).

To the above rule there are the following limitations and exceptions.

(*a.*) *A tenant is not estopped from disputing the title of a person from whom he did not actually receive possession of the premises* (*r*).—Of this, the following cases may be given as illustrations.

A. demises certain premises to B., and gives him possession. Subsequently, A. assigns the premises to C., and B. attorns tenant to C. A. being bankrupt, C. brings ejectment against B. and the assignees under A.'s bankruptcy. Held, that B.'s acknowledgment of C. as his landlord does not estop him from showing that A. was bankrupt at the date of the assignment to C., and that consequently the assignment was invalid (*s*).

(*m*) *Dolby* v. *Iles*, 11 A. & E. 335.

(*n*) *Sylliran* v. *Stradling*, 2 Wils. 208, and other illustrations, *ante*, pp. 242 *et seq.*

(*o*) *Delaney* v. *Fox*, 2 C. B. N. S. 768.

(*p*) *Ogle* v. *Atkinson*, 5 Taunt. 759, as explained by Williams, J., in *Delaney* v. *Fox*, 2 C. B. N. S. at p. 777.

(*q*) *Watson* v. *Lane*, 11 Ex. 769.

(*r*) *Gregory* v. *Doidge*, 3 Bing. 474; *Brook* v. *Biggs*, 2 Bing. N. C. 572.

(*s*) *Doe* d. *Plevin* v. *Brown*, 7 A. & E. 447. The proper course, however, for the tenant to take, if he wishes to contest the title of a party who has not actually let him into possession, is first to give

M., being seised in fee of certain premises, lets a part of them in 1826 to B. as yearly tenant. In 1829 M. mortgages the premises to plaintiff's lessor. Subsequently B., on demand from plaintiff's lessor, pays the rent to him from time to time. In 1833, plaintiff's lessor demises the part not already let to B., to C. as yearly tenant, who pays rent to him till 1834, and afterwards underlets to W. In 1835, both B. and W. refuse to pay rent to plaintiff's lessor, and he serves on them notices to quit, and then brings an action of ejectment. At the trial, defendants offer to prove that M. had, in 1821, mortgaged the premises to N. in fee, himself remaining in possession, and that in 1835, N. had assigned his interest to S. in fee, and that subsequently S. had given notice to defendants to pay him the rent, and that they had paid him accordingly. This evidence was rejected on the trial, but a rule for a new trial was obtained, on the ground of its rejection (*t*). Per Lord Denman, C.J., (at p. 313), "The defendants stand in different situations. W. is precluded from denying that plaintiff's lessor ever had a title, and must show that such title as he had is determined. B. is precluded from denying that M. had a title, but he is at liberty to deny that plaintiff's lessor ever had any derivative title from M., unless the payment of rent concludes him. We do not think that he is so concluded, because he, being tenant to M., and having notice of a subsequent mortgage by M. to plaintiff's lessor, had no right to question it, nor,

up possession of the premises, and then to bring ejectment. Per Patteson, J., in *Hall* v. *Butler*, 2 P. & D. at p. 377.

(*t*) *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307.

until he received notice from S. of the prior mortgage, had he any reason to doubt that the legal estate had passed to plaintiff's lessor. He may truly be said to have paid the rent under a mistake, and then he may show, not that M. had not a title by which he, B. would be estopped as against M. himself, but that M.'s title was not such a one as would enable him to pass a legal estate to plaintiff's lessor. As to W., he is bound to admit that plaintiff's lessor had a title when he, W., was let into possession."

(β.) *A tenant is not estopped from showing that his landlord's title expired at a period subsequent to the date when he, the tenant, was let into possession* (*u*)*; or that the landlord has, at such subsequent period, been treated as a trespasser* (*x*)*; or has sold his interest in the premises* (*y*)*; or has mortgaged them* (*z*).—The tenant must, however, in order to be allowed to show the expiration of his landlord's title, solemnly renounce such title at the date of its expiration, and commence a fresh holding under some other person (*a*).

(*u*) *England* v. *Slade*, 4 T. R. 682; *Neave* v. *Moss*, 1 Bing. 360; *Pope* v. *Biggs*, 9 B. & C. at p. 251; *Doe* d. *Marriott* v. *Edwards*, 5 B. & Ad. 1065; *Mountnoy* v. *Collier*, 1 E. & B. 630; *Delaney* v. *Fox*, 2 C. B. N. S. 768; *Downs* v. *Cooper*, 2 Q. B. 256; *Doe* d. *Strode* v. *Seaton*, 2 C. M. & R. 728; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *Langford* v. *Selmes*, 3 K. & J. 220; and see notes to *Walton* v. *Waterhouse*, 1 Wms. Saund. (ed. 1871), p. 418. In the case of an action of ejectment, the tenancy must have expired previously to the commencement of the action; *Gibbins* v. *Buckland*, 1 H. & C. 736.

(*x*) *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307.

(*y*) *Doe* d. *Lowden* v. *Watson*, 2 Stark. 230.

(*z*) *Waddilove* v. *Barnet*, 2 Bing. N. C. 538.

(*a*) *Balls* v. *Westwood*, 2 Camp.

Thus, where A. brought an action against B. for use and occupation of copyholds and it was proved at the trial that B. entered on the premises under A., and paid rent to him till within the last two years, and that he still continued in possession of the same, it was held, that B. was precluded from setting up a forfeiture of the estate into the hands of the lord of the manor; but that B. might show that he solemnly renounced A.'s title at the time of the forfeiture, and commenced a fresh holding under another person (*b*).

Again, A. is let into possession by B., as tenant for one year certain, at a rent payable quarterly. B. undertakes to finish the house by a certain time, and to give A. the option of a lease at the end of the year. B. himself has no other title to the premises than an agreement with C., of a date previous to the commencement of A.'s possession, by which C. agreed to grant B. a lease after he had finished the houses, reserving to himself a power of re-entry, and avoiding the agreement if the houses were not completed within six months. The houses are not finished, and C., before any rent is due from A. to B., re-enters and turns A. out of possession, and finishes the houses himself. Subsequently, A. takes the houses from C. under a new *bonâ fide* agreement, by which a fresh rent is reserved, and

11. *Quære*, whether the expiration of the landlord's title as to part of the premises, is a defence *pro tanto* to an action for use and occupation of the whole, and see *Mountnoy* v. *Collier*, 1 E. & B. 630. A tenant may, however, set up another title in himself to part of the premises; *Clark* v. *Adie*, L. R. 2 App. Cas. 423.

(*b*) *Balls* v. *Westwood*, 2 Camp. 11.

takes possession under the same. B. then distrains on A. for rent, and A. brings an action of replevin against B. Held, that the above facts are evidence for A. upon the issue of *non tenuit* (*c*).

(γ.) *A tenant may dispute his landlord's title, if he has been evicted* (*d*) *by title paramount, and by a party entitled to the immediate possession of the premises; or if under threat of eviction by a party having a title paramount and entitled to the immediate possession of the premises, he has attorned tenant* (*e*).

(δ.) *A tenant may dispute his landlord's title, if he can show a better title in himself.*—For instance, he may show a prior title (*f*), or an affirmative title, in himself, from which any title his landlord had was derived (*g*).

Thus, A. brings ejectment against B.; A. claims under a conveyance from C.; B. claims under a subsequent conveyance from C.; B. is not estopped from showing that C. had no title at the date of his conveyance to A. (*h*).

(*c*) *Hopcraft* v. *Keys*, 9 Bing. 615. As to what is sufficient to create a fresh tenancy under the mortgagee, where the landlord has mortgaged the premises, see *Waddilove* v. *Barnet*, 2 Bing. N. C. 538; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *contra Wilton* v. *Dunn*, 17 Q. B. 294; *Evans* v. *Elliot*, 9 A. & E. 342.

(*d*) The eviction must, however, it appears, be actual and not merely constructive, see *Delaney* v. *Fox*, 2 C. B. N. S. 768. See, however, Bigelow on Estoppel (2nd ed.), p. 364, citing *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307; *Hawkes* v. *Orton*, 5 A. & E. 367, and *Emery* v. *Barnett*, 4 C. B. N. S. 423.

(*e*) *Mayor of Poole* v. *Whitt*, 15 M. & W. 571.

(*f*) *Doe* d. *Colemere* v. *Whitroe*, 1 Dowl. & R. N. P. Rep. 1.

(*g*) *Ford* v. *Ayer*, 2 H. & C. 279.

(*h*) *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531.

(ε.) *A tenant is only estopped from disputing his landlord's title to the extent of the interest granted.*—For instance, he is not estopped from doing so after the termination of his lease (*i*), even though he holds over and after notice to quit (*k*), or after he has restored possession of the premises to his landlord (*l*).

Thus, A. being in possession of a house and premises, B. asked leave to get vegetables in the garden, and having obtained the keys for that purpose, he fraudulently took possession of the house, and set up a claim of title. A. then brought ejectment against B. Held, that B., having entered by leave of the party in possession, could not defend an ejectment, but was bound to deliver up the premises before contesting the title (*m*). Per Coleridge, J. (at p. 192), "There is no distinction between the case of a tenant and that of a common licensee. The licensee, by asking permission, admits that there is a title in the landlord."

Similarly a licensee under a patent cannot in any way question its validity during the continuance of his license. But he may show that what he has done (in respect of which patent royalties are claimed from him), does

(*i*) *Doe* d. *Oliver* v. *Powell*, 1 A. & E. 531; *L. & N. W. Ry. Co.* v. *West*, L. R. 2 C. P. 553; *Clark* v. *Adie*, L. R. 2 App. Cas. 423, at p. 435. Conf. Co. Litt. 47 *b*; *James's Case*, Moore, 181.

(*k*) *Watson* v. *Lane*, 11 Exch. 769.

(*l*) *Accidental Death Insurance Co.* v. *McKenzie*, 5 L. T. N. S. 29. The same rule holds good where a person has taken a lease of his own land, *ibid.* See also *England* v. *Slade*, 4 T. R. 682. The estoppel, it appears, does not continue after the death of the parties, Co. Litt. 47 *b*; *Brereton* v. *Evans*, 2 Cro. Eliz. 700.

(*m*) *Doe* d. *Johnson* v. *Baytup*, 3 A. & E. 188.

not fall within the limits of the patent, but is something extraneous to it (*n*).

And a mortgagor, remaining in possession of the mortgaged premises, is estopped from denying the title of his mortgagee (*o*). On a similar principle, a devisee is estopped from disputing the title of the devisor through whom he claims. Thus, A. being tenant by the curtesy of certain premises, devises them by will to trustees for his daughter R. for life, with remainder to his grandson W. Upon the testator's death, R. enters into possession of the premises, and remains in undisturbed possession for over 20 years. W. conveys his remainder to plaintiff. R., after being in possession for over 20 years, conveys the premises in fee to defendant, who, on her death, takes possession. Plaintiff brings ejectment against defendant. Held, that R., having entered under the will, defendant claiming through her is estopped as against all those in remainder (under the will), from disputing the validity of the will, and that plaintiff can recover (*p*). Again, A. devises real estate to B. for life remainders over, and dies, and B., claiming as tenant for life under the will, enters into possession of the estate, and remains in possession for a period long enough to acquire a title by adverse possession under the Statute of Limitations. B. then by his will devises the estate to

(*n*) *Clark* v. *Adie*, L. R. 2 App. Cas. 423.

(*o*) *Moss* v. *Gallimore*, 1 Dougl. 279; *Birch* v. *Wright*, 1 T. R. 378 & 383; *Partridge* v. *Bere*, 5 B. & Ald. 604; per Bayley, J., in *Pope* v. *Biggs*, 9 B. & C. at p. 251; *Hitchman* v. *Walton*, 4 M. & W. 409; *Doe* d. *Higginbotham* v. *Barton*, 11 A. & E. 307 & 314.

(*p*) *Board* v. *Board*, L. R. 9 Q. B. 48.

defendants, and plaintiffs, the remaindermen under A.'s will, bring an action for recovery of possession against defendants. Held that, assuming A.'s devise to be void, and consequently there to be an intestacy as to his estate, B. is not estopped from setting up his statutory title to the estate, by having wrongly claimed to enter as tenant for life, or by his acknowledgment that he was in possession only as tenant for life (*q*). The principle upon which estoppels of this kind depend is well explained by Jessel, M. R., in his judgment in the above case, as follows (*r*): "It is said, the tenant for life entered, claiming as tenant for life having no title whatever, and because he claimed as tenant for life, and for many years thought he was till he found out his mistake, therefore he cannot deny there was a remainder, that is to say, because a man wrongly claimed and succeeded in his wrong claim, he cannot suggest that anybody else may have a wrong claim. I do not understand that at all. I do understand the doctrine of the numerous cases cited, which may be divided into two classes. The first is, that where a man having no title obtains possession of land under a demise by a man in possession, who assumes to give him title as tenant, he cannot deny his landlord's title; as for instance, if he takes for twenty-one years and he finds the landlord has only five years title, he cannot after the five years set up against the

(*q*) *In re Stringer's Estate, Shaw* v. *Jones-Ford*, L. R. 6 Ch. D. 1. Jessel, M.R.'s decision as to the non-validity of A.'s devise was reversed on appeal; but it is here assumed for the purposes of illustration, that the devise was void.

(*r*) L. R. 6 Ch. D. at p. 9.

landlord the *jus tertii*, though of course the real owner can always recover against him. That is a perfectly intelligible doctrine. He took possession under a contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way, he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a title. That is a well-established doctrine. That is estoppel by contract. Another class of cases, of which several instances were referred to, is this—A man is in possession of land with a defective title, but he has possession. In fact under the old law he could not have devised without, except in the case of certain reversions. He devises to a man for life, with remainder over. The devisee, having no title except under the will, enters under the will. It has been held that he cannot deny that the testator had a right to devise in the way he has devised; that is, that the testator had a sufficient title to support the devise as far as the devisee is concerned, not to make the devises valid which were invalid, because the devises were invalid *per se* if the testator had insufficient title. Therefore the whole of the estoppel is this, 'You have entered under the will of a man who had possession: as far as you are concerned, possession is the fee; you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee, though you may have found out afterwards that he was only tenant for years, or tenant from year to year, or tenant for life, or anything else. You have got

possession under that will, and possession in law, as far as you are concerned, of the fee.' All that I understand. That is a little extension of the principle of estoppel by contract, but it follows on the same principle. But now we come to a suggested third extension, and that is this. A man enters under a will which contains an invalid devise. It is alleged that by claiming under that will and getting possession, he affirms the invalid devise; if he himself enters without title, it is said that because he has no title himself, his entry gives a new title to the remainderman. I cannot see it How can it be said that his entry, though wrongful as tenant for life, estops him from doing anything? why cannot he set up the defect against the remainderman? can it make any difference if it happens to be the same defect? why cannot he admit the defect, and say, 'I find now I have no claim to the property.' It does not appear to me to be within the doctrine of estoppel at all."

A tenant may also be estopped by certain acts of his, such as attornment, and payment of rent, from disputing the title of the person to whom he has attorned or paid rent. The general principle with regard to such acts is as follows:—

A tenant cannot dispute the title of the person to whom he has attorned tenant and paid rent, in the absence of any fraud, mistake (*s*), *or misrepresentation, in the circumstances under which the attornment and payment of rent took place* (*t*).

(*s*) *Jew* v. *Wood*, Craig. & P. 185; *Gravenor* v. *Woodhouse*, 1 Bing. 38; *Cornish* v. *Searell*, 8 B. & C. 471.

(*t*) Per Bayley, J., in *Panton* v. *Jones*, 3 Camp. 372; *Doe* d.

The following cases may be given as illustrations of the above principle.

In an action of replevin, it appeared that plaintiff had come into occupation of the premises under a person who had paid rent to defendant upon a distress. Held, that after proof of this fact, plaintiff was estopped from disputing defendant's title to the rent, notwithstanding that defendant inadvertently put in evidence a document, which showed that plaintiff's predecessor occupied under a lease to which defendant was in law a stranger (*u*).

A tenant, on his landlord's decease, agreed to retake the premises from his landlord's devisee for a term, and retained possession, and attorned tenant and paid rent to the devisee. In ejectment by the devisee against the tenant, held that the tenant was estopped by the attornment and payment of rent, from disputing the devisee's title under the will (*x*).

A. grants B. a lease, subject to a former lease still subsisting. B. pays rent to A. under his lease. A. brings ejectment against B. for breaches of covenant. Held, that B. cannot dispute A.'s title by setting up the former lease, even though the defect in A.'s title appears on the face of the instrument on which he relies (*y*).

Payment of rent is alone evidence of an attornment, and raises the presumption of one. But this presumption

Jackson v. *Wilkinson*, 3 B. & C. 413; *Doe* d. *Manton* v. *Plomer*, 9 Bing. 41; *Cooper* v. *Blandy*, 4 Moo. & Sc. 562; *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367; *Williams* v. *Heales*, L. R. 9 C. P. 177.

(*u*) *Cooper* v. *Blandy*, 1 Bing. N. C. 45.

(*x*) *Doe* d. *Marlow* v. *Wiggins*, 4 Q. B. 367.

(*y*) *Duke* v. *Ashby*, 7 H. & N. 600.

may be rebutted by other circumstances, *e. g.*, that the tenant when he paid the rent was not acquainted with all the circumstances of his landlord's title (*z*), or that the person to whom payment of rent was made, had no legal interest in the premises (*a*), or that his title was defective, even though payment was made under a distress (*b*). For, generally speaking, acceptance of rent by a person who has no title, does not raise an estoppel (*c*). And where a tenant has paid rent or acknowledged a tenancy to a party who did not originally let him into possession, he is not precluded thereby from showing that the rent was paid under a mistake, or that the payment was induced by misrepresentation, and that the party to whom it was paid had in reality no title to the premises (*d*). And if the party who originally let the tenant into possession dies, and the tenant afterwards pays rent or attorns tenant to another party who claims under the deceased (*e*), the tenant is not thereby precluded from requiring him to prove his title to the premises (*f*).

On the other hand a party, by occupying premises, or

(*z*) *Fenner* v. *Duplock*, 2 Bing. 10.

(*a*) *Doe* d. *Harvey* v. *Francis*, 2 Moo. & Rob. 57.

(*b*) *Knight* v. *Cox*, 18 C. B. 645.

(*c*) Co. Litt. 352 *b*.

(*d*) *Rogers* v. *Pitcher*, 6 Taunt. 202; *Doe* d. *Nepean* v. *Budden*, 5 B. & Ald. 626; *Claridge* v. *McKenzie*, 4 M. & G. 143.

(*e*) But it appears that it is otherwise if the party to whom rent is paid does not claim under deceased, *e.g.*, where A., tenant for life, granted a void lease to B., who, on A.'s death, paid rent to the remainderman C., held, that B. or his assigns could not dispute C.'s title in an action of replevin. *Johnson* v. *Mason*, 1 Esp. 89; see also *Solomon* v. *Turner*, 1 Stark. 51.

(*f*) *Jew* v. *Wood*, Craig. & P. 185.

paying, or receiving rent therefor, after another party's decease, may under certain circumstances, as in the case of an executor *de son tort*, be precluded from denying his own title to the premises, and be held personally liable on covenants, &c.

For example.—A. demises to B. certain lands for one year certain, and then from year to year so long as the parties should think proper, with power to determine the tenancy on giving notice to quit. B. dies, and his executors occupy the premises and pay rent, and no notice to quit is given them. Held, that they are chargeable in their personal character upon the terms contained in the original demise; as their occupation, coupled with the fact that the landlord abstains from giving them notice to quit, raises an implied promise on their part to abide by the terms of the original contract (*g*). Again, plaintiff's predecessors in title grant a lease to A. his executors, administrators, and assigns. A. subsequently dies intestate. His widow administers his estate, and remains possessed of the lease till her death. After her death her son-in-law (defendant's father) without administration takes possession of the premises, and receives the rent, and pays the ground rent till his death. After his death defendant receives the rent, and, after paying ground rent, hands over the balance to his mother;

(*g*) *Buckworth* v. *Simpson*, 1 C. M. & R. 834. Mere payment of rent, however, on the part of an assignee of the leasehold estate of an intestate, who is without notice that no letters of administration had been taken out to the intestate's estate, is not sufficient to vest the lease in such assignee, as executor *de son tort*, by operation of law. *Paull* v. *Simpson*, 9 Q. B. 365.

and after her death defendant continues to receive the rent and pay the ground rent, no further administration being taken out. In an action against defendant on the covenants in the lease, held, that the defendant has estopped himself from denying that he was assignee of the lease, by continuing to receive the rents and pay the ground rent after his mother's death (*h*).

Not only may the tenant be estopped by payment of rent, from disputing his landlord's title, but the landlord may, by receiving rent from the tenant, be estopped from denying that he let the premises to the tenant (*i*). Or again, a landlord may by requiring his tenant to pay rent to another person, be estopped from setting up his relationship of landlord against him (*k*).

Surrender by operation of law.—The question of estoppel between landlord and tenant is sometimes raised by the surrender of an estate. By the Statute of Frauds (*l*) and the Real Property Amendment Act (*m*), surrenders of estates, excepting copyholds and customary estates and those interests which by law may be created without writing, must be by deed. A surrender of this kind, which may be called a statutory surrender, would therefore, if it operated as an estoppel, take effect as an estoppel by deed. But besides this class of surrender, there is another, which arises from some act or agreement of the parties themselves, and to which effect is

(*h*) *Williams* v. *Heales*, L. R. 9 C. P. 177.

(*i*) Bro. Estop. pl. 100; *Sumner* v. *Scolfield*, 43 L. T. 763.

(*k*) Per Lord Denman, C. J., in *Downs* v. *Cooper*, 2 Q. B. 256, at p. 262.

(*l*) 29 Car. II. c. 3, s. 2.

(*m*) 8 & 9 Vict. c. 106, s. 3.

given at common law, and which is called a surrender by operation of law. This, if it operates as an estoppel, takes effect as an estoppel *in pais*. The general nature of a surrender by operation of law is well explained by Parke, B., in his judgment in *Lyon* v. *Reed* (*n*), as follows:—"We must consider what is meant by a surrender by operation of law. This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate continued to exist. Thus if the lessee for years accepts a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be done during his term, therefore he is deemed in law to have surrendered his term to the lessor In such a case as this

(*n*) 13 M. & W. 285, at p. 305.

there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention The surrender would be the act of the law, and would prevail in spite of the intention of the parties" (*o*).

There is, however, considerable doubt, arising from the conflicting character of the leading decisions on the point, as to what conduct of the parties is sufficient to constitute a surrender by operation of law. The doubt arises where in cases of leases of corporeal hereditaments, a new tenant is substituted for the old one before the termination of the existing lease; and the real point of difficulty is whether or not an acceptance by the landlord of the new tenant, with the consent of the old one, is sufficient to constitute a surrender in law of the old lease. The leading case of *Thomas* v. *Cook* (*p*), followed by *Walker* v. *Richardson* (*q*), *Turner* v. *Hardey* (*r*), *Lynch* v. *Lynch* (*s*), and *Nickells* v. *Atherstone* (*t*), and the principle of which was applied to freeholds in *Mellow* v. *May* (*u*), decided that it was sufficient. On the other hand *Swift* v. *Heath* (*x*), and *Lyon* v. *Reed* (*y*), followed by *Creagh* v. *Blood* (*z*), decided that it was not. The question is fully and ably discussed in the note to the Duchess of Kingston's case,

(*o*) See also Bro. Ab. Surrender, pl. 48; Bac. Ab. Leases, s. 2; Ro. Ab. & Vin. Ab. Tit. Surrender (F and G); Comyn's Dig. Tit. Surrender (T and I. 2); Sheppard's Touchstone, p. 301; and *Fulmerston* v. *Steward*, Plowden's Rep. 102.

(*p*) 2 B. & Ald. 119.

(*q*) 2 M. & W. 882.

(*r*) 9 M. & W. 770.

(*s*) 6 Ir. L. R. 131.

(*t*) 10 Q. B. 944; see also *Davison* v. *Gent*, 1 H. & N. 744.

(*u*) Moore, 636, cas. 876.

(*x*) Carth. 110.

(*y*) 13 M. & W. 285.

(*z*) 3 J. & Lat. 133.

in Smith's Leading Cases (*a*), and we do not propose to enter upon it here. There are, however, certain rules respecting surrenders-in-law which appear to be free from doubt, and which are as follows:—

(1.) Where there is an agreement between a landlord and a tenant under a lease, that the latter shall vacate and the former shall resume possession of the premises, and possession is taken accordingly, that amounts to a surrender of the lease by operation of law (*b*). But, in order to constitute such a surrender there must be mutuality of consent between landlord and tenant (*c*), and an actual retaking of possession by the landlord, or an act or acts equivalent thereto (*d*). The agreement itself however need not be in writing, but may be by parol, notwithstanding the Statute of Frauds (*e*).

(2.) Without any express agreement, a surrender in law may result from acts done by the landlord and tenant, which are inconsistent with the continuance of the tenancy. For instance, if the landlord grants the tenant a new lease during the continuance of the former one, it will be presumed that it was intended that the former one should be surrendered, and consequently it will be considered as surrendered by operation of law (*f*). But a

(*a*) Smith's L. C. (8th ed.), vol. ii., p. 886 *et seq.*

(*b*) *Grimman* v. *Legge*, 8 B. & C. 324; *Dodd* v. *Acklom*, 7 Scott's N. R. 415. And, as to the effect of taking possession of part of the premises only, see *Holme* v. *Brunskill*, L. R. 3 Q. B. D. 495; and *Jones* v. *Bridgman*, 39 L. T. 500.

(*c*) *Morrison* v. *Chadwick*, 7 C. B. 266.

(*d*) *Mollett* v. *Brayne*, 2 Camp. 103; *Walker* v. *Godé*, 6 H. & N. 594; *Cadle* v. *Moody*, 30 L. J. Ex. at p. 387; *Phené* v. *Popplewell*, 12 C. B. N. S. 334; *Oastler* v. *Henderson*, L. R. 2 Q. B. D. 575; *Moss* v. *James*, 37 L. T. N. S. 715; 38 L. T. N. S. 595.

(*e*) *Gore* v. *Wright*, 8 A. & E. 118.

(*f*) Per Parke, B., in *Lyon* v. *Reed*, 13 M. & W. 285, at p. 305, and *ante*, p. 262.

void lease, *e. g.*, a lease made under a power of leasing which is invalid, owing to the power not having been properly exercised, cannot operate as a surrender of a prior valid subsisting lease (*g*). The following cases may be given as illustrations of the above rule:

Defendants, the tenants of certain premises, left the key at the counting house of the landlord, and the latter, although he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenants' names, and then gave them formal notice that he had resumed possession. In an action by the landlord for rent for three quarters, commencing the day before the date of the notice, held, that the return of the key, coupled with the landlord's subsequent acts, amounted to a surrender by operation of law, and that the action was not maintainable (*h*).

Plaintiffs let a house to defendant for seven years from Ladyday, 1868. Defendant entered and occupied till Michaelmas, when he left England for America. He left the keys with an agent to dispose of the house if he could, and, if not, to make the best bargain he could with plaintiffs for the surrender of the term. The agent was unable to find a tenant, and gave the keys in December, 1868, to plaintiffs. They employed a house agent to let the house, and gave him the keys for that purpose. The house

(*g*) *Wilson* v. *Sewell*, 4 Burr. 1980; *Davison* d. *Bromley* v. *Stanley*, 4 Burr. 2213; *Roe* d. *Berkeley* v. *York*, 6 East, 86; *Doe* d. *Egremont* v. *Courtenay*, 11 Q. B. 702; *Doe* d. *Biddulph* v. *Poole*, 11 Q. B. 713.

(*h*) *Phené* v. *Popplewell*, 12 C. B. N. S. 334.

agent put up bills in the house, and advertised it to let, and charged plaintiffs with the costs of the bills and advertisements. The house agent, with plaintiffs' authority, frequently showed applicants over the house during 1869, and only returned the keys to plaintiffs for a short time in 1870, when they wanted the use of the two rooms for their workmen, who occupied the same for a short time for the purpose of plaintiffs' business. The house was not let till Ladyday, 1872, when a new tenant was put in. Plaintiffs then brought an action against defendant for rent from Michaelmas, 1868, to Ladyday, 1872. Held, that there had been no possession of the house by plaintiffs so inconsistent with the continuance of defendant's term, as to estop plaintiffs from alleging the continuance of it, *i. e.*, that there had been no surrender of the term by operation of law (*i*).

(3.) If it is wished to substitute a new tenant for the outgoing tenant before the expiration of the latter's lease, in order for a surrender in law of the former lease to take place, there should be a "triangular" agreement to that effect between the owner of the reversion, the outgoing tenant, and the new tenant (*k*). And the outgoing tenant must also give up possession to the new tenant, in order to complete the surrender (*l*). Thus, A. being tenant of a close under B., and K. tenant of another close

(*i*) *Oastler* v. *Henderson*, L. R. 2 Q. B. D. 575; see also *Moss* v. *James*, 37 L. T. N. S. 715; 38 L. T. N. S. 595.

(*k*) Per Martin, B., in *Cadle* v. *Moody*, 30 L. J. Ex. at p. 387; see also *Stone* v. *Whiting*, 2 Stark. 235.

(*l*) *Doe* d. *Huddlestone* v. *Johnston*, McClel. & Y. 141; *Johnstone* v. *Huddlestone*, 4 B. & C. 922; *contra*, *Doe* d. *Egremont* v. *Forwood*, 3 Q. B. 627.

under D., A. and K. agreed by parol to exchange closes, and to pay each other's rent. Each took possession of the other's close, pursuant to the arrangement, which was assented to by C., who was the steward of both the landlords. Held, that on these facts there was evidence to go to the jury of a surrender by operation of law of K.'s interest to his landlord (*m*).

A mere demise of incorporeal hereditaments by the landlord to a stranger with the tenant's consent, would appear to be alone insufficient to constitute a surrender of the tenant's interest, unless the tenant were actually a party to it (*n*). In the case of corporeal hereditaments, the law is as we have stated (*o*), doubtful. But it would seem that in any case such a demise would bind the reversioner who granted the lease (*p*), or the stranger who took it (*q*), though it might not bind the tenant who was not a party to it (*r*). And a distinction might possibly be drawn between a case where a stranger is put in by the landlord with the consent and authority of the tenant (*s*), and a case where the stranger is admitted pre-

(*m*) *Bees* v. *Williams*, 2 C. M. & R. 581.

(*n*) *Lyon* v. *Reed*, 13 M. & W. 285. The reason appears to be that incorporeal hereditaments by the common law lie in grant, that is, can only be conveyed by deed. Co. Litt. 9 *a*; Shep. Touch. 228. And, therefore, in such a case, a surrender by deed would be advisable.

(*o*) See *ante*, p. 263, and the cases there referred to.

(*p*) *Thomas* v. *Cook*, 2 B. & Ald. 119.

(*q*) *Phipps* v. *Sculthorpe*, 1 B. & Ald. 50.

(*r*) *Lyon* v. *Reed*, 13 M. & W. 285. And it would certainly not bind him if he merely stood by while his landlord granted a fresh lease to another. See *Creagh* v. *Blood*, 3 J. & Lat. 133.

(*s*) *Nickells* v. *Atherstone*, 10 Q. B. 944.

viously to any agreement being made between the landlord and the tenant (*t*).

Finally it may be remarked that a surrender of a lease does not bar the lessor who accepted it from bringing an action against the tenant on any cause of action which arose prior to the surrender, *e. g.*, on a covenant to repair which was broken before the surrender (*u*).

Analogous cases to those of landlord and tenant.—In analogy to the rule that a tenant is estopped from disputing his landlord's title, a bailee, agent, or licensee (*x*), is estopped, except under certain circumstances, from denying the title, to goods, of the bailor, principal, or licensor, respectively, (*α*), who entrusted him with the goods, or (*β*), whose title to the goods he has acknowledged. The rule with regard to principal and agent is, that an agent must account to his principal, and cannot set up the *jus tertii* against him, except when the principal has been acting under a *bonâ fide* misapprehension as to the rights of some third person, or has been fraudulently acting in derogation of those rights. And the same rule applies in the case of bailor and bailee (*y*).

(*t*) *Thomas* v. *Cook*, 2 B. & Ald. 119.

(*u*) Vin. Ab. Estop. p. 461, citing Bro. Estop. pl. 201.

(*x*) For instances of the estoppel arising between a licensor (or assignor) of a patent and his licensee (or assignee), see *Hayne* v. *Maltby*, 3 T. R. 438; *Hall* v. *Conder*, 2 C. B. N. S. 22; *Lawes* v. *Purser*, 6 E. & B. 930; *Taylor* v. *Hare*, 1 B. & P. N. R. 260; *Noton* v. *Brooks*, 7 H. & N. 499; *Crossley* v. *Dixon*, 10 H. L. Cas. 293; *Clark* v. *Adie*, L. R. 2 App. Cas. 435.

(*y*) *Anon. Case*, cited in *Laclouch* v. *Towle*, 3 Esp. at p. 115; *Stonard* v. *Dunkin*, 2 Camp. 344; *Dixon* v. *Hamond*, 2 B. & Ald. 310; *Nickolson* v. *Knowles*, 5 Maddock, 47; *Roberts* v. *Ogilby*, 9 Price, 269; *Gosling* v. *Birnie*, 7 Bing. 339; *White* v. *Bartlett*, 9

Thus Blackburn, J., in *Biddle* v. *Bond* (*z*), says, "The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant, who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount." The estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount, because the bailee has no better title than the bailor; and consequently if a person entitled as against the bailor to the property, claims it, the bailee has no defence against him (*a*). But it is not enough that the bailee has become aware of the title of a third person (*b*). And a bailee can only set up the *jus tertii* against his bailor, if he defends upon the right and title, and by the authority, of that person (*c*). Thus he cannot set it up, if the person making the claim, has, with full knowledge of the circumstances, abandoned his claim (*d*). For, to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another, who makes no claim, or who has abandoned his claim, would enable the depositary to keep for himself

Bing. 378; *Holl* v. *Griffin*, 10 Bing. 246; *Hawes* v. *Watson*, 2 B. & C. 540; *Cheesman* v. *Exall*, 6 Ex. 341; *Biddle* v. *Bond*, 6 B. & S. 225.

(*z*) 6 B. & S. 225, at p. 231; see also *Shelbury* v. *Scotsford*, Yelverton, 22; *Wilson* v. *Anderton*, 1 B. & Ad. 450.

(*a*) *Wilson* v. *Anderton*, 1 B. & Ad. 450.

(*b*) *Biddle* v. *Bond*, 6 B. & S. 225, at p. 231 (per Blackburn, J.).

(*c*) *Thorne* v. *Tilbury*, 3 H. & N. 534 (per Pollock, C. B.)

(*d*) *Betteley* v. *Reed*, 4 Q. B. 511.

that to which he does not pretend to have any title in himself whatever (*e*). Nor is it enough that an adverse claim is made upon a bailee, sufficient to entitle him to relief under an interpleader (*f*). Nor is a mere notice of an adverse claim, given to the bailee by a third person, sufficient; for an agent to receive for the use of another cannot, by a mere notice from a third person, be converted into an implied trustee for him (*g*). But if a bailee, knowing of two adverse claims to goods, elects to take the part of one of the claimants and to sell the goods as his, in that case he is afterwards estopped from denying that claimant's title (*h*). And if a bailee, by attorning to a purchaser of goods, in effect represents to him that the property has passed to him, though such was not the fact, and thereby induces him to alter his position and pay the price to his vendor, he is estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the purchaser to act (*i*). But generally speaking, where there is fraud on the part of one of the claimants, a bailee will, in the case of an adverse claim, be entitled to relief under an interpleader (*j*). And, even where there is no fraud,

(*e*) *Betteley* v. *Reed*, 4 Q. B. 511; *Biddle* v. *Bond*, 6 B. & S. 225.

(*f*) *Thorne* v. *Tilbury*, 3 H. & N. 534.

(*g*) *Nickolson* v. *Knowles*, 5 Maddock, 47.

(*h*) *Ex parte Davies, in re Sadler*, L. R. 19 Ch. D. 86.

(*i*) Per Blackburn, J., in *Biddle* v. *Bond*, 6 B. & S. 225, at p. 231. The representation is analogous to a warranty of title for good consideration to the purchaser. See *ibid.*

(*j*) *Cheesman* v. *Exall*, 6 Ex. 341; *Attenborough* v. *London & St. Katherine's Dock Co.*, L. R. 3 C. P. D. 450.

although a person in possession of goods may be technically estopped from denying the claim of the person who entrusted him with such possession, yet if a *bonâ fide* claim is made to them by a third person, a jury should disregard the technical estoppel, and direct an issue under the interpleader Acts, to try the question as to the property between the plaintiff and the claimant (*k*).

The following may be given as illustrations of the estoppel arising between bailor and bailee, principal and agent, licensor and licensee, and in analogous cases.

Plaintiff sued a bailee in assumpsit for a horse, viz., for breach of his contract to re-deliver it. Defendant pleaded that J. S., the true owner of the horse, took it from him. After verdict for defendant, it was moved in arrest of judgment that, notwithstanding the verdict, judgment ought to be given against defendant on his own confession, by his plea in bar. But, by *Fenner* and *Yelverton*, *contra*. For the matter alleged by defendant does in law discharge the promise, by reason of the former property of the horse in J. S., and then it is as an eviction of the horse out of defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants, in any sort depending on the interest (*l*).

(*k*) Per Brett, L. J., in *Attenborough* v. *London & St. Katherine's Dock Co.*, L. R. 3 C. P. D. 450, at p. 460 : see, however, *Crawshay* v. *Thornton*, 2 Myl. & Cr. 1. *A fortiori*, this would be done in a case where the property in the goods had never passed out of the original owner. See *Sheridan* v. *New Quay Co.*, 4 C. B. N. S. 618; and note at end of case (at p. 650), referring to Story on Bailments (2nd ed.), § 582.

(*l*) *Shelbury* v. *Scotsford*, Yelverton, 22.

A warehouseman, on receiving an order from the seller of malt to hold it on account of the purchaser, gave a written acknowledgment to the purchaser that he so held it. In an action by the purchaser against the warehouseman of trover for the malt, held, that defendant was precluded from adducing evidence to show that, by the usage of trade, the property in malt is not transferred till it is re-measured, and that, before the malt in question was re-measured, the seller became bankrupt (*m*).

Defendants sold 348 barrels of flour, out of a larger quantity in their possession as warehousemen, to C., who sold them to plaintiffs and handed to them the delivery order. Upon plaintiffs presenting the delivery order to defendants, they said it was all right, and transferred the flour in their books from the name of C., to that of plaintiffs, who thereupon paid part of the price to C. C., having become bankrupt without having paid for the flour, and defendants refusing to continue the deliveries to plaintiffs, held that defendants were estopped from saying that no property in the flour had passed to plaintiffs, although no specific portion had been appropriated to them (*n*). Per Pollock, C.B., (at p. 174), "The real question was, whether the defendants had so conducted themselves that the plaintiffs had a right to say, 'We call upon you to deliver us the flour which you say you held on our behalf.' The question

(*m*) *Stonard* v. *Dunkin*, 2 Camp. 344.

(*n*) *Woodley* v. *Coventry*, 2 H. & C. 164; see also *Gillett* v. *Hill*, 2 C. & M. 530; *Hawes* v. *Watson*, 2 B. & C. 540; and Blackburn on Contract of Sale, p. 161.

"whether the property passed, as between vendor and vendee, never arose; the only question was, whether the defendants had acknowledged that they held the flour on behalf of the plaintiffs, for, if so, according to law and justice, they were bound to deliver it or pay the damages" (*o*).

M. purchased of defendant, a corn dealer, with his warehouse next a railway station, eighty quarters of barley, which were not specifically appropriated to him, and for which he did not pay. Subsequently M. sold sixty quarters of the barley to plaintiff, who paid for them, and then M. sent a delivery order for the barley through the station-master to plaintiff. Plaintiff enclosed the order in a letter to the station-master, requesting him to confirm the transfer and to send him samples. The station-master thereupon saw defendant, and showed him both documents, whereupon defendant said, "All right; when you get the forwarding note, I will put the barley on the line." After this plaintiff gave a forwarding note to the station-master for the barley, which he presented to defendant. M. in the meantime having become bankrupt, and not having paid defendant for the barley, defendant refused to deliver the barley. Upon an action of trover for the barley brought by plaintiff against defendant, held, that defendant, by his statement to the station-master, had estopped himself from denying that he held the barley for plaintiff (*p*).

(*o*) See *note* (*n*), p. 272.

(*p*) *Knights* v. *Wiffen*, L. R. 5 Q. B. 660. See also the comments thereon by Brett and Cotton, L.JJ., in *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188, at pp. 212, 216.

Defendant was employed by plaintiff to sell, as an auctioneer, certain goods in plaintiff's possession. Before the sale, a notice was given to defendant by the assignees of an insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between plaintiff and the insolvent. Defendant, after that notice, sold the property, and rendered an account of the sale to plaintiff; but, on an indemnity being given to him by the assignees, he refused to pay over to plaintiff the money arising from the sale; and, in an action brought against him by plaintiff, he set up the title of the assignees in defence. The jury at the trial affirmed the title of the assignees, and found that plaintiff obtained possession of the goods by a fraud between him and the insolvent. Upon this judgment was given for the defendant (*q*).

Goods sold to A. are afterwards claimed by B., and delivered to him. In trover by A. against the vendor, held that the latter cannot set up B.'s title (*r*).

Plaintiff, being possessed of some plate, transferred it by bill of sale to M. and B., for valuable consideration, but in order to defeat the execution of a judgment creditor, plaintiff continued in possession of the plate, and the creditor, having assigned his judgment to M. and B., they issued execution thereon; whereupon plaintiff, in order to defeat the execution, deposited the plate with defendant. Plaintiff then brought trover for the plate against defendant. One of the questions

(*q*) *Hardman* v. *Willcock*, 9 Bing. 382.

(*r*) *Kieran* v. *Sandars*, 6 A. & E. 515.

left to the jury was, whether the plate was pledged by defendant for a debt, or was given fraudulently, and to defeat the execution. The jury found that the plate was pledged fraudulently, and to defeat the execution. Judgment for defendant on this finding (*s*).

Certain goods of R. were seized by plaintiff under a distress for rent of a house alleged to have been demised by plaintiff to R., and were delivered by plaintiff to defendant to sell as his auctioneer. When the sale was about to begin, R. served a notice on defendant that the distress was void, and requiring him not to sell, or, if he sold, to retain the proceeds for him. Defendant sold the goods, but refused to pay over the proceeds of sale to plaintiff, and defended an action brought against him by plaintiff, relying on the right and authority of R. The distress was actually void and tortious, as the relation between plaintiff and R. was not that of landlord and tenant; but, although plaintiff was a wrong doer, there was no fraud on his part, as he thought he had a right to distrain. Held, on the above facts, that defendant might set up the *jus tertii* of R. as an answer to the action (*t*).

An auctioneer took possession of goods on behalf of a bill of sale holder, and, when the sale was stopped by injunction, remained in possession of them on behalf of the receiver under a petition in bankruptcy, and eventually sold them for the trustee in bankruptcy. On receiving a notice from the bill of sale holder, the

(*s*) *Cheesman* v. *Exall*, 6 Ex. 341.

(*t*) *Biddle* v. *Bond*, 6 B. & S. 225.

auctioneer declined to pay over the proceeds to the trustee. Held, that the money, which had by consent been paid into court, must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, and was therefore estopped from denying his title (*u*).

(*u*) *Ex parte Davies, in re Sadler*, L. R. 19 Ch. D. 86.

CHAPTER IX.

NEGOTIABLE INSTRUMENTS.

The law of estoppel bears a somewhat different relation to negotiable instruments from that which it bears to deeds. This distinction was pointed out in the celebrated case of *Swan* v. *North British Australasian Company* (*a*), and seems to rest upon the ground that deeds take effect by delivery, whereas negotiable instruments derive their peculiar attributes from the law merchant (*b*). Thus Byles, J., in his judgment in the above case (*c*), says, "The arguments drawn from negotiable instruments appear altogether inapplicable. The object of the law merchant as to bills and notes made or become payable to bearer, is to secure their circulation as money: therefore, honest acquisition confers title. To this despotic but necessary principle, the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across

(*a*) 7 C. B. N. S. 400; 7 H. & N. 603; 2 H. & C. 175; and see *post*, pp. 357 *et seq.*

(*b*) By the Bills of Exchange Act, 1882 (45 & 46 Vic. c. 61), the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(*c*) 2 H. & C. 175.

a slip of stamped paper (which transaction being a forgery would in ordinary cases convey no title), may give a good title to any sum fraudulently inscribed within the limits of the stamp (*d*), and in America, where there are no stamp laws, to any sum whatsoever. Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value: the instrument may be lost by the maker without his negligence, or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stop short of fraud, he has a title. . . . The truth is, that in the case of a bill of exchange or promissory note, as well as in the case of a deed, the law respects the nature and uses of the instrument, more than its own ordinary rules." Again, Williams, J., in his judgment in the same case (*e*), says, "In *Marston* v. *Allen* (*f*), Alderson, B., refused to adopt the proposition that the previous party to a bill is estopped from setting up the defence of fraud against the case of a *bonâ fide* holder for value, and thought it better to say that by the law merchant every person having possession of a bill, has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer it to a *bonâ fide* holder for value (*g*). It seems, therefore, doubtful whether the cases as to the liability of a man who signs a blank bill

(*d*) See now, however, 45 & 46 Vic. c. 61, s. 24.

(*e*) 7 C. B. N. S. 100.

(*f*) 8 M. & W. 494.

(*g*) See, in confirmation of this, in the case of negotiable instruments payable to bearer, *Goodwin* v. *Roberts*, L. R. 1 App. Cas.

or note or cheque, are founded on the doctrine of estoppel, or on a rule of the law merchant, that an actual authority is thereby conferred on the person in whose hands the instrument is. It is however plain, that none of the decisions as to the effect of signing instruments in blank, extend beyond the case of negotiable instruments. And it seems to me, that it would be inconvenient and dangerous to apply the principle of them any further." The difference between the principles of estoppel, and the rules of the law merchant, is also well explained in the judgment of Wilde, B., in the same case (*h*), as follows: "It has been contended that the doctrine of estoppel is limited in its application to cases arising on negotiable instruments. But why should it be so? It rests upon a ground totally different from that which renders negotiable instruments valid. The law of negotiability is the law of property passing by delivery. It gives to actual transfer the effect of real title. The law merchant validates, in the interest of commerce, a transaction which the common law would declare void for want of title or authority: and transactions within its operation are as absolutely valid and effectual, as if made with title or authority. But how different is the principle of estoppel! It validates no transaction whatever. It all along implies a transaction itself invalid, and a person who is forbidden for equitable reasons to set up that invalidity. It is therefore independent of negotiability; it operates in a different way; founded upon principles of equity and fairness between man and man, it rests on a

176; *Rumball* v. *The Metropolitan Bank*, L. R. 2 Q. B. D. 194, *post*, p. 368.

(*h*) 7 H. & N. 603.

wider basis than the principle which supports title in negotiable instruments; and as it has no relation to commercial intercourse or the exigencies of trade, so it is not confined to instruments which have become negotiable by the demands of commerce."

But many of the cases on negotiable instruments which are noticed in this chapter, although, strictly speaking, they may not be cases of estoppel, have been decided on principles closely analogous thereto. The net result of some of them is contained in the Bills of Exchange Act, 1882 (*i*), but occasional reference will be made to them for the purpose of illustrating or explaining the statutory "preclusion" which the Act has created in their place.

By sec. 22 of the above Act it is enacted as follows:

(1.) Capacity to incur liability (*k*) as a party to a bill is co-extensive with capacity to contract. Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill, unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2.) Where a bill is drawn or indorsed by an infant (*l*), minor, or corporation (*m*), having no capacity or power to incur liability on a bill, the drawing or indorsement

(*i*) 45 & 46 Vic. c. 61. Most of the decisions before the Act are collected in Chalmers's book on Bills of Exchange, Notes and Cheques.

(*k*) As to capacity to benefit by a bill or note, see *Kitchen* v. *Bartsch*, 7 East, 53, where it was held a good plea to an action on a note, that plaintiff, to whom note was made, was at the time an uncertificated bankrupt.

(*l*) Accord. *Grey* v. *Cooper*, 3 Dougl. 65; *Lebel* v. *Tucker*, 8 B. & S. at p. 833.

(*m*) As to corporations, accord. *Smith* v. *Johnson*, 3 H. & N. 222.

entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

A corporation incurs no liability by drawing, indorsing or accepting a bill, unless expressly or impliedly empowered by its Act of incorporation so to do (*n*). Thus, a joint-stock company is incorporated for the purpose of forming *a société anonyme* abroad for the construction of railways. The directors are empowered by the memorandum and articles of association to do whatever they may from time to time think incidental or conducive to the main object of the company. These terms cover the issue of bills, and such a company is liable on its acceptance (*o*). A railway company incorporated under an ordinary Railway Act, accepts bills which are negotiated. The company is not liable on its acceptance (*p*).

By sec. 23, no person is liable as drawer, indorser, or acceptor of a bill, who has not signed it as such. Provided that:

(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon, as if he had signed it in his own name:

(2.) The signature of the name of a firm is equivalent to the signature by the person so signing, of the names of all persons liable as partners in that firm.

Thus A., a retiring partner, omits to inform the customers of the firm, in the usual mode, that the continuing partners are no longer authorised to act as his agents.

(*n*) *Re Peruvian Ry. Co.*, L. R. 2 Ch. App. 617. As to the capacity of married women and infants to contract, see *ante*, p. 206, and *post*, pp. 378 *et seq.*

(*o*) *Ibid.*

(*p*) *Bateman* v. *Mid-Wales Ry. Co.*, L. R. 1 C. P. 499.

The firm accepts bills, subsequently to A.'s retirement. A. is liable on them (*q*). E. orders goods from A., and they are invoiced to E. and son. A bill is drawn for the price on E. and son. This bill is accepted in the son's handwriting, in the name of E. and son. The son is not a partner, but his conduct leads A. to believe that E. and the son are in partnership together, and A. acts on the belief. The son is liable on the bill (*r*).

By sec. 24, subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority (*s*). Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery (*t*).

(*q*) See per Parke, B., in *Freeman* v. *Cooke*, 2 Ex. 654; and *Scarf* v. *Jardine*, L. R. 7 App. Cas. at pp. 349, 357, *post*, p. 378.

(*r*) *Gurney* v. *Evans*, 3 H. & N. 122. And see, as to the principles upon which a man may be held liable as a partner by estoppel, *Mollwo, March & Co.* v. *Court of Wards*, L. R. 4 P. C. at p. 435, and illustrations in Chapter X., *post*, pp. 326—328.

(*s*) *Mead* v. *Young*, 4 T. R. 28; *Bank of Bengal* v. *Fagan*, 7 Moore's P. C. at p. 72; *Robarts* v. *Tucker*, 16 Q. B. 560; *Harrop* v. *Fisher*, 30 L. J. C. P. 283; *Heilbutt* v. *Nevill*, L. R. 5 C. P. 478; *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. 578; *Charles* v. *Blackwell*, L. R. 2 C. P. D. at p. 157.

(*t*) By sec. 73, except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on

The result of the above section therefore, is, that forged or unauthorised signatures to bills are wholly inoperative, except (α.) in certain cases specially provided for by the Act; (β.) in cases not provided for by the Act, where the party against whom it is sought to retain or enforce payment of the bill, is estopped from setting up the forgery or want of authority; (γ.) in cases where there has been a ratification of a signature, which does not amount to a forgery.

(α.) *Cases of forged or unauthorised signatures specially provided for by the Act.*—(1.) By sec. 20, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. But, in order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

demand, apply to a cheque. By sec. 89, subject to the provisions in this Part, and except as by this section provided, the provisions of this Act relating to bills of exchange, apply, with the necessary modifications, to promissory notes. [The maker of a note corresponds with the acceptor of a bill, and the first indorser of a note corresponds with the drawer of an accepted bill payable to drawer's order.]

(2.) By sec. 54 (*u*), the acceptor of a bill, by accepting it, is precluded from denying to a holder in due course (i.) the existence (*x*) of the drawer, the genuineness of his signature (*y*), and his capacity (*z*), and authority (*a*) to draw the bill; (ii.) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse (*b*), but not the genuineness or validity of his indorsement; (iii.) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse (*c*), but not the genuineness or validity of his indorsement (*d*).

The following case may be given as an illustration: B., a member of the firm of W. and B., solicitors, drew and indorsed for value to plaintiff, in the partnership name, a bill of exchange payable to the order of W. and B., which defendant accepted without consideration.

(*u*) Subject to any renunciation of rights. See sec. 62.

(*x*) Accord. *Cooper* v. *Meyer*, 10 B. & C. 468; *Ashpitel* v. *Bryan*, 5 B. & S. 723.

(*y*) Accord. *Jenys* v. *Fawler*, 2 Str. 946; *Smith* v. *Chester*, 1 T. R. 654; *Sanderson* v. *Collman*, 4 M. & G. 209; *Beeman* v. *Duck*, 11 M. & W. 251; *contra*, *Wilkinson* v. *Lutwidge*, 1 Str. 648.

(*z*) Accord. *Smith* v. *Marsack*, 6 C. B. 486; *Hallifax* v. *Lyle*, 3 Ex. 446.

(*a*) Accord. *Braithwaite* v. *Gardiner*, 8 Q. B. 473; *Smith* v. *Marsack*, *ibid.*; *Hallifax* v. *Lyle*, *ibid.*

(*b*) Accord. *Pitt* v. *Chappelow*, 8 M. & W. 616; *Smith* v. *Marsack*, 6 C. B. 486; *Hallifax* v. *Lyle*, 3 Ex. 446.

(*c*) Accord. *Drayton* v. *Dale*, 2 B. & C. 293.

(*d*) Accord. *Smith* v. *Chester*, 1 T. R. 654; *Mead* v. *Young*, 4 T. R. 28; *Robinson* v. *Yarrow*, 7 Taunt. 455; *Beeman* v. *Duck*, 11 M. & W. 251. The acceptor, *supra protest*, is bound by the estoppels which bind an ordinary acceptor; and also by the estoppels which would bind the party for whose honour he accepted; see Chalmers on Bills of Exchange, p. 176, citing *Phillips* v. *Im Thurn*, 18 C. B. N. S. 694; L. R. 1 C. P. at p. 471.

The indorsement was in respect of an entirely private matter of business between B. and plaintiff, unconcerned with partnership purposes. B. had no authority from W. either to draw or to indorse the bill. In an action by the indorsee against defendant, defendant by a plea traversed the indorsement. Held, that defendant was not estopped by his acceptance from giving evidence in support of the plea (*e*). Per Blackburn, J., delivering the judgment of the court: "If the defendant had accepted the bill with the intent that B. should indorse the bill, and so raise money on it, it might have been a serious question whether she would not have been estopped from denying the indorsement (*f*): but no such fact is found. And, in the absence of such a fact, the acceptor (generally), though he admits the authority of the person drawing the bill to draw it, does not admit the authority of the same person to indorse it."

(3.) By sec. 55, sub-sec. 2 (*g*), the indorser of a bill, by indorsing it, (i.) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature (*h*), and all previous indorsements (*i*), (ii.) is precluded from denying to his immediate or a subsequent indorsee, that the bill was at the time of his indorsement a valid and

(*e*) *Garland* v. *Jacomb*, L. R. 8 Ex. 216.

(*f*) *Beeman* v. *Duck*, 11 M. & W. 251.

(*g*) Subject to any renunciation of rights. See sec. 62.

(*h*) Accord. *Lambert* v. *Pack*, 1 Salk. 127.

(*i*) Accord. *Critchlow* v. *Parry*, 2 Camp. 182; *Ex parte Clarke*, 3 Bro. C. C. 238; *Thicknesse* v. *Bromilow*, 2 Cr. & J. 425; *Armani* v. *Castrique*, 13 M. & W. 443; *McGregor* v. *Rhodes*, 6 E. & B. 266.

subsisting bill, and that he had then a good title thereto (*k*).

(4.) When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged, or made without authority (*l*).

The protection afforded to bankers by the above section (and the one referred to in the note), only applies to bills payable to order on demand, drawn on bankers, *i.e.*, to cheques (see sec. 73). Thus it does not provide for a case like the following one. An insurance company were in the practice of paying losses due to country customers, by accepting drafts on the company in London, drawn by their country agent to the order of the customer. The drafts were not drawn till the company in London gave the agent leave to draw; nor accepted, till they bore the indorsement of the payees, and were found, on examination, to correspond with the leave to

(*k*) Accord. *Burchfield* v. *Moore*, 23 L. J. Q. B. 261. By sec. 56, where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser, to a holder in due course.

(*l*) Sec. 60. A similar protection to bankers is afforded by 16 & 17 Vic. c. 59, s. 19, a section which still remains in force; and, for decisions thereunder, see *Ogden* v. *Benas*, L. R. 9 C. P. 513; *Charles* v. *Blackwell*, L. R. 2 C. P. D. 151. Further, for the statutory protection afforded to bankers paying crossed cheques, see 39 & 40 Vic. c. 81.

draw. When accepted, they were made payable at the bank of R., the London banker of the company. R. was not informed of this practice. A loss of £5,000 became due to I. at Manchester. The agent of the company at Manchester, in pursuance of their leave, drew on the company a draft for £5,000 payable to the order of I., and delivered it to I.'s solicitor. This draft, purporting to be indorsed by I. to the order of J. and L. (London bankers), was by J. and L. presented for payment to the company, and accepted by them, payable at R.'s bank. On maturity, it was there paid to J. and L. This payment was debited to the company in the pass-book delivered to them, and they credited R. with the payment. No objection was made till, six months afterwards, it was discovered that the indorsement purporting to be that of I., was a forgery by the solicitor, and the company were compelled to pay I. In an action brought by the company against R., to recover the amount of the bill, it was held (by the Court of Exchequer Chamber in error), first, that the acceptance of a bill of exchange payable at a banker's, is tantamount to an order to the banker, to pay the bill to any person who, according to the law merchant, can give a valid discharge for it, and not merely to the lawful holder; and that the banker may debit his customer with such payment. Secondly, that a banker cannot debit his customer with a payment made to one who claims through a forged indorsement, and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the bankers, to pay the bill without reference to the genuineness of the indorsement, or equivalent to

an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from shewing it to be forged; that the facts in the case afforded no evidence to go to the jury of such a direction, or of such an inducement, and that therefore plaintiffs were entitled to recover (*m*).

But where S. K., an agent of S. and Co., plaintiffs, having authority to sell goods for them and to receive payment by cash or cheque, but not having authority to indorse cheques, received from defendants, in payment for goods supplied, a cheque on their bankers drawn payable to S. and Co. or order; and S. K. indorsed it "S. and Co., per S. K., agent," received the money from the bankers, and misappropriated part of it, and the bankers returned the cheque to defendants, and the amount was allowed in account by defendants; it was held, affirming the decision of the Common Pleas Division, that such payment by the bankers was within the protection of the before mentioned Act (*n*); and that plaintiffs could not maintain an action against defendants, either for the price of the goods or for the cheque (*o*).

(β.) *Cases not provided for by the Act, where the party against whom it is sought to retain or enforce payment of the bill, is precluded from setting up the forgery or want of authority.*—These may be classified as follows:—

(1.) Cases where the party whose signature has been forged or placed on the bill without his authority, has

(*m*) *Roberts* v. *Tucker*, 16 Q. B. 560; explained in *Woods* v. *Thiedemann*, 1 H. & C. at p. 495.

(*n*) 16 & 17 Vic. c. 59, s. 19, *ante*, p. 286, note (*l*).

(*o*) *Charles* v. *Blackwell*, L. R. 2 C. P. D. 151.

led a *bonâ fide* holder for value to believe that the signature is genuine, and the belief has been acted upon (*p*). Thus, B.'s acceptance to a bill is forged. C., a *bonâ fide* holder for value, being informed that the signature is not B.'s, writes to B. to inquire; B. writes back, acknowledging the signature. C. then retains the bill, and afterwards sues B. on it. B. is liable on the acceptance (*q*).

(2.) Cases where the party whose signature is unauthorized, has, by his conduct, consented to the exercise by the person who signs without authority, of an authority to sign his name, and the bill is negotiated to a *bonâ fide* holder for value without notice. Thus, B., a partner in a trading firm, fraudulently accepts a bill in the firm's name for a private debt of his own. It is negotiated to a *bonâ fide* holder for value without notice. The firm is estopped from setting up B.'s fraud (*r*). Per Willes, J., "The reason why, in the case of a partnership, a party is bound by an acceptance which is not his own, but that of his co-partner, is a reason founded on

(*p*) The mere fact that the party paid a bill on a former occasion which bore the same signature, is not relevant evidence under this heading. *Morris* v. *Bethell*, L. R. 5 C. P. 47. As to the course of dealing necessary to establish such a belief, see *Barber* v. *Gingell*, 3 Esp. 60; and cf. *McKenzie* v. *British Linen Co.*, L. R. 6 App. Cas. 82, *post*, p. 350.

(*q*) *Wilkinson* v. *Stoney*, 1 J. & S. 509.

(*r*) *Hogg* v. *Skeen*, 18 C. B. N. S. at p. 432. A *bonâ fide* holder for value without notice is denominated in the Act a holder in due course (see sec. 29). The rights of a holder in due course belong to all those who derive title to the bill through him, and are not themselves parties to any fraud or illegality affecting it (*ibid.*). See also sec. 30, subsec. 2.

the law of estoppel *in pais*. Having consented to the exercise by another of an apparent authority to accept bills so as to bind him (even though such authority has been fraudulently exercised), as against a person who has taken the bill *bonâ fide* and without notice of the fraud, the acceptor is estopped from denying the acceptance."

(3.) Cases where a party, who would not otherwise be estopped from denying the genuineness of a signature which is forged, has negotiated the bill with knowledge of the forgery. Thus, a bill of exchange, purporting to be drawn by B. & W. (a really existing firm) payable to their order, and indorsed by them, is negotiated by the acceptor with that indorsement upon it. The drawing and indorsement are forgeries, but the bill is accepted, and negotiated by the acceptor, with knowledge of the forgery. He is estopped from denying the genuineness of the indorser's signature, as well as that of the drawer (*s*).

(4.) Cases where a party is estopped from denying the genuineness of a signature which is forged, owing to his own negligence. The negligence, however, in order to operate as an estoppel must be (α) in the transaction itself, and not merely collateral to it; (β) the proximate cause of leading the third party into mistake; and (γ) the neglect of some duty which is owing to such third party or to the general public (*t*); and, if the instrument

(*s*) *Beeman* v. *Duck*, 11 M. & W. 251.

(*t*) *Freeman* v. *Cooke*, 2 Ex. 654; *Swan* v. *North British Australasian Co.*, 7 C. B. N. S. 400; 7 H. & N. 603; 2 H. & C. 175; *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. 578; *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. 525.

is inchoate (*u*), it must (δ) have been issued with the intention of its being used. Thus, defendant gave H. his blank acceptance on a stamped paper, and authorized H. to fill in his name as drawer. H. returned the blank acceptance to defendant in the same state in which he received it. Defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name, without defendant's authority, and an action was brought on it by plaintiff as indorsee for value. Held, that defendant was not liable on the bill: per Brett, L. J., on the ground that, after the return of the blank acceptance by H., defendant had never authorized any one to fill in a drawer's name, and that he had never issued the acceptance with the intention of its being used (*x*).

If the above conditions are fulfilled, the rule laid down in *Lickbarrow* v. *Mason* (*y*), applies, namely, that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must bear it. Of this rule the following cases may be given as illustrations, although the first two have recently been doubted as authorities (*z*).

(*u*) By sec. 20 of the Act, where a simple signature on a blank stamped paper is delivered by the signer, in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser. See also *Garrard* v. *Lewis*, L. R. 10 Q. B. D. 30; and accord. *Russell* v. *Langstaffe*, 2 Dougl. 514; *Young* v. *Grote*, 4 Bing. 253; *Montague* v. *Perkins*, 22 L. J. C. P. 187.

(*x*) *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. 525.

(*y*) 2 T. R. 63.

(*z*) See *post*, pp. 292, 293, notes (*a*) and (*b*).

A customer of a bank delivered to his wife certain printed cheques signed by himself, but with blanks for the sums, requesting his wife to fill up the blanks according to the exigency of the business. She caused one to be filled up with the words fifty pounds two shillings, the fifty being commenced with a small letter, and placed in the middle of a line. The figures 50 were also placed at a considerable distance from the printed £. She delivered the cheque in this state to her husband's clerk to receive the amount: whereupon he inserted at the beginning of the line in which the word fifty was written, the words three hundred and, and also the figure 3 between the £ and the 50. The bankers having paid the £350 2*s.*, held, that the loss must fall on the customer, the drawer of the cheque, on account of the negligent way in which it had been filled up by his wife (*a*).

A. accepted a bill, and gave it to B. (who put his name thereto as drawer), for the purpose of his procuring it to be discounted, and handing over the proceeds to A. B. having failed to discount the bill, returned it to A., who tore it in half, and threw the two pieces into the street. B. picked up the pieces in A.'s presence, and afterwards pasted them together, and put the bill in cir-

(*a*) *Young* v. *Grote*, 4 Bing. 253, as explained by Lord Coleridge, C. J., in *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. at p. 587. *Young* v. *Grote*, was cited and not disapproved of in *Swan's Case*, *post*, pp. 357 *et seq.*, approved of in *Foster* v. *Green*, 7 H. & N. 881, and *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. at p. 587; and followed in *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183 (*post*, pp. 293–5); but has since been doubted by Brett, L. J., in *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. at p. 534; and see now sec. 64 of the Act, *post*, p. 296.

culation, and it came into the hands of a *bonâ fide* holder without notice, who sued A. on the bill. The tearing of the bill was done in such a way that the appearance of the bill was consistent with its having been divided for the purpose of safe transmission by post, as well as with the fact that it was divided for the purpose of destroying it. But the jury found that A. tore the bill in half, with the intention of cancelling it. Held, that A. was liable on the bill (*b*).

A banker indorsed, for the benefit of a customer, two parts of a bill, both being fully stamped, and with the words "eight days" written sufficiently far apart for the insertion after the indorsement of the letter "y." Held, that such parts did not constitute two bills, and that there was no negligence so as to disentitle the banker from setting up the alteration as a defence to an action on the bill; and that he was not estopped from taking advantage of a fraudulent sale by the customer, of the two parts as separate bills (*c*).

Defendant, the salaried manager of a bank, was appointed treasurer to guardians of the poor. A treasurer's account between him and the guardians was duly kept, and moneys were from time to time paid into the bank of which he was manager, to the

(*b*) *Ingham* v. *Primrose*, 7 C. B. N. S. 85. This case was, however, dissented from by Brett, L. J., in *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. at p. 532; but it has not been expressly overruled, and it has for so long been regarded as an authority that we give it in the text as an illustration of principle.

(*c*) *Société Générale* v. *Metropolitan Bank*, 21 W. R. 335. And see now as to alterations, The Bills of Exchange Act, 1882 (45 & 46 Vic. c. 61, s. 64), *post*, p. 296.

account of the guardians, and orders signed by the guardians were, in conformity with the orders, cashed like cheques payable to order. Defendant received no salary or remuneration as treasurer, and the guardians received interest on their balance, when it exceeded £3,000. A person in the service of the clerk to the guardians, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces, and, after signature of the orders he increased the amounts accordingly. He also forged indorsements to orders so increased in amount, and to others not so increased, and obtained payment of them at the bank. On a case stated by an arbitrator, in an action brought by the guardians against defendant for the amount of the orders so paid, it was found as a fact, that the payment by the treasurer's clerks of the excess was due solely to the fact that they were misled by want of proper caution on the part of plaintiffs and their clerk in signing the orders—fraudulently prepared for their signature. Held, that the negligent drawing of the orders disentitled plaintiffs to complain of the payment of the excess (*d*). Per Cleasby, B. (at pp. 191, 192), delivering the judgment of the court, and speaking of the various reasons which had been given for the decision in *Young* v. *Grote* (*e*). "But these various reasons for the conclusion only show how incontestable the conclusion itself is—and it is perhaps

(*d*) *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183.

(*e*) 4 Bing. 253.

only an application of one of those general principles, which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz.: that a man cannot take advantage of his own wrong, a man cannot complain of the consequence of his own default, against a person who was misled by that default, without any default of his own."

There must, however, be some actual negligence on the part of an innocent person in order to render him liable. Thus, the manager of plaintiff's bank obtained defendant's signature to a cheque, purporting to be drawn upon the bank by defendant, under the pretence that it was a receipt, defendant being unable to read. The manager then paid defendant a private debt of his own, with the banker's money. The transaction was entered in the books of the bank as a loan from the bank to defendant, upon his cheque. Held, that plaintiff could not recover the money from defendant, (1) on the ground that the cheque had been obtained by the fraud of his agent, (2) on the ground that, defendant being unable to read, there was no culpable negligence on his part in signing a document represented to be a receipt (*f*).

(γ.) *Cases where there has been a ratification of a signature which does not amount to a forgery.*

In order for a ratification to be possible there must not have been any actual forgery of the signature. Thus, A. forges B.'s signature to a promissory note for £100.

(*f*) *Foster* v. *Green*, 7 H. & N. 881. *Quære*, whether, even if negligence had been proved, this would have been sufficient in face of the agent's fraud.

Before the note matures, the holder finds out that B.'s signature is a forgery, and threatens to prosecute A. In order to prevent this, B. gives the holder a memorandum, which says: "I hold myself responsible for the note for £100 bearing my signature." The ratification is invalid. B. is not liable on the note (*g*).

By sec. 54 it is further enacted, that the acceptor of a bill, by accepting it, is precluded from denying to a holder in due course, the existence of the drawer, and his capacity to draw the bill.

By sec. 55 of the Act, sub-sec. 1, the drawer of a bill, by drawing it, is precluded from denying to a holder in due course, the existence of the payee and his then capacity to indorse (*h*). He is not however precluded from denying the genuineness of the payee's indorsement (*i*).

By sec. 88, sub-sec. 2, the maker of a promissory note, by making it, is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

By sec. 64, (1) where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the

(*g*) *Brook* v. *Hook*, L. R. 6 Ex. 89, cited in Chalmers on Bills of Exchange, at p. 65.

(*h*) Accord. *Collis* v. *Emmett*, 1 H. Bl. 313; *Phillips* v. *Im Thurn*, 18 C. B. N. S. 694; L. R. 1 C. P. at p. 471.

(*i*) *Duncan* v. *Scott*, 1 Camp. 100.

alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour; (2) in particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

It seems that an alteration of the marginal figures in a bill would not be a material alteration within the above section, as the marginal figures are not an essential part of the bill (*k*). But, with regard to material alterations, the above section appears to alter the law in cases like *Young* v. *Grote* (*l*).

(*k*) *Garrard* v. *Lewis*, L. R. 10 Q. B. D. 30.

(*l*) 4 Bing. 253; *ante*, p. 292.

CHAPTER X.

REPRESENTATION.

The first enunciation in England of the above as a distinct branch of estoppel was made in the well-known case of *Pickard* v. *Sears* (*a*), described by an American writer on estoppel (*b*) as a case which bears much the same relation to this part of the subject as the *Duchess of Kingston's case* does to estoppel by record. The origin, however, of this branch of estoppel, according to the same author, is to be found in equity, and he cites the authority of Lord Eldon in *Evans* v. *Bicknell* (*c*), who says: "For it is a very old head of equity, that if a representation be made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false" (*d*). The rules of law, however,

(*a*) 6 A. & E. 469; see also *Heane* v. *Rogers*, 9 B. & C. 586; and *Graves* v. *Key*, 3 B. & Ad. 318, note (*a*); where the principles laid down in *Pickard* v. *Sears*, were foreshadowed, but not distinctly enunciated.

(*b*) See Bigelow on the Law of Estoppel (2nd ed.), p. 431.

(*c*) 6 Ves. Junr. 173, 182; and see *Burrowes* v. *Lock*, 10 Ves. Junr. 470.

(*d*) The same principle had, however, been adopted at common law in actions of deceit. See *Pasley* v. *Freeman*, 3 T. R. 51. And see *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188 (per Brett, L. J., at p. 206).

applicable to this class of estoppel, have only taken definite shape in modern times.

The principles upon which estoppels of this kind depend, are well stated in the cases of *Pickard* v. *Sears* (*e*), *Gregg* v. *Wells* (*f*), and *Freeman* v. *Cooke* (*g*), which may be regarded as leading cases upon this part of the subject, and which, together with some later cases which serve to explain or illustrate them, will be first dealt with in the present chapter. These principles, and the dicta in support of them, which have, with few exceptions (*h*), been approved of by the most eminent authorities, have been applied to a great variety of cases, some of which will be given as illustrations in the present chapter.

The general principle is stated by Lord Denman, C. J., in *Pickard* v. *Sears* (*i*), as follows: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position; the former is concluded from averring against

(*e*) 6 A. & E. 469.

(*f*) 10 A. & E. 90.

(*g*) 2 Ex. 654.

(*h*) In *Jorden* v. *Money*, 5 H. L. Cas. 185. Lord Cranworth (at p. 214) says that he thinks the rule is stated a little too broadly in *Gregg* v. *Wells*, 10 A. & E. 90. Not so, Lord St. Leonards, who approves of the rule as there stated; see his judgment at p. 255. But see also per Stephen, J., in *Alderson* v. *Maddison*, L. R. 5 Ex. D. 293, at p. 303.

(*i*) 6 A. & E. 469. It appears that the doctrine laid down in *Pickard* v. *Sears* has no application to a conveyance of land. See the judgments in *White* v. *Greenish*, 11 C. B. N. S. 209 (per Erle, C. J., at p. 230, per Byles, J., at p. 234, and per Keating, J., at p. 236.)

the latter a different state of things as existing at the same time." It is pointed out by Parke, B., in *Freeman* v. *Cooke* (*k*), that the word "wilfully" should be taken as governing both the word "causes" and the word "induces"; and he further says: "Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now in question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears* (*l*), must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so

(*k*) 2 Ex. 654; see also *McKenzie* v. *British Linen Co.*, L. R. 6 App. Cas. 82.

(*l*) 6 A. & E. 469.

authorised" (*m*). Again, Lord Denman, C. J., says, in *Gregg* v. *Wells* (*n*): "*Pickard* v. *Sears* (*o*) was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." In the case of *Howard* v. *Hudson* (*p*), Crompton, J., puts the same interpretation on the word "wilfully," where he says that the rule, as explained in *Freeman* v. *Cooke* (*q*), "takes in all the important commercial cases, in which a representation is made, not wilfully in any bad sense of the word, not *malo animo*, or with the intent to defraud or deceive, but so far wilfully that the party making the representation on which the other acts means it to be acted upon in that way." And, in the case of *Cornish* v. *Abington* (*r*), Pollock, C. B., observes, that according to the case of *Freeman* v. *Cooke* (*s*), the word "wilfully," in the rule as laid down in *Pickard* v. *Sears* (*t*), means nothing more than "voluntarily." He says: "Lord Wensleydale perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily,' but to 'unintentionally,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced uninten-

(*m*) See also the judgments in *Scarf* v. *Jardine*, L. R. 7 App. Cas. 345, at pp. 349, 357.
(*n*) 10 A. & E. 97.
(*o*) 6 A. & E. 469.
(*p*) 2 E. & B. 1.
(*q*) 2 Ex. 654.
(*r*) 1 H. & N. 549.
(*s*) 2 Ex. 654.
(*t*) 6 A. & E. 469.

tionally, the same result would follow. If a party uses language which in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct" (*u*). Again, in the recent case of *Polak* v. *Everett* (*x*), Blackburn, J., observes that the rule as laid down in *Pickard* v. *Sears* (*y*) "was corrected in *Freeman* v. *Cooke* (*z*), where it was said that if a man stands by and allows another to act without objecting, when, from the usage of trade or otherwise, there is a duty to speak, his silence would preclude him as much as if he proposed the act himself."

In most cases in which the doctrine in *Pickard* v. *Sears* (*a*) has been applied, the representation is such as to amount to the contract or licence of the party making it (*b*). Thus, in the case of *Clarke* v. *Hart* (*c*), Lord Chelmsford says, "So that I apprehend, where there is a

(*u*) See also *Thomas* v. *Brown*, L. R. 1 Q. B. D. 714, per Mellor, J., at p. 722.

(*x*) L. R. 1 Q. B. D. 669.

(*y*) 6 A. & E. 469.

(*z*) 2 Ex. 654.

(*a*) 6 A. & E. 469.

(*b*) See per Parke, B., in *Freeman* v. *Cooke*, 2 Ex. 654.

(*c*) 6 H. L. Cas. 633, at p. 656; and see Lord Cranworth's judgment in *Jorden* v. *Money*, 5 H. L. Cas. 185.

vested right or interest in any party, the principle of law as now firmly established, is, that he cannot waive or abandon that right, except by acts which are equivalent to an agreement or a licence." But such licence or agreement may be implied from acquiescence of such a nature as to induce a reasonable belief that the act done is licensed or agreed to by the party so acquiescing (*d*).

The principles of an estoppel *in pais* or equitable estoppel, have also been stated by Brett, L. J., in the form of distinct propositions, in the case of *Carr* v. *London & North Western Ry. Co.* (*e*), as follows: "One such proposition," says the learned judge, "is, if a man by his words or conduct, wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false; and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement, is estopped from averring afterwards that such a state of things did not in fact exist (*f*). Another recognised proposition seems to be that, if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the

(*d*) *Cairncross* v. *Lorimer*, 3 Macq. 827.

(*e*) L. R. 10 C. P. 307.

(*f*) Conf. judgment of Baron Wilde in *Swan* v. *North British Australasian Co.*, 7 H. & N. 603, who says, "The rule of decision which I deduce from an examination of the various authorities is this, that, if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden against them to deny that assertion."

damage of him who so believes and acts; the first is estopped from denying the existence of such a state of facts. And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage; the first is estopped from denying that the facts were as represented. There is yet another proposition as to estoppel. If, in the transaction itself, which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led the other to act by mistake upon such belief, to his prejudice; the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist" (*g*).

The result of the estoppel is that the party benefiting by it acquires a "right" or "title" by estoppel against the party by whom the representation was made (*h*). But, as in the case of estoppels by record and by deed, an estoppel arising from a representation is binding only on parties and privies, *i.e.*, those who are privy, in estate or otherwise, to the person by whom the represen-

(*g*) The principles of an estoppel *in pais* have also been very concisely stated in Stephen's Digest of the Law of Evidence (3rd ed.), at p. 109.

(*h*) See per Cotton, L. J. in *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188, at p. 213.

tation was made (*i*); but it does not bind strangers. Thus where M., being the owner of goods, procured H. to assign them by bill of sale to R., to secure an advance of money, and R. took the goods *bonâ fide*, and upon M.'s assurance that the goods belonged to H.; and the goods were afterwards seized, under a *fi. fa.*, as the goods of M.; and, upon the trial of an interpleader issue between R. and the execution creditor, the jury found that there had been no actual transfer of the goods from M. to H.; it was held, that R. had not acquired any title by estoppel to the goods, against the execution creditor (*k*).

The representation may be by words or conduct, or partly by one and partly by the other. It may also be contained in writing, in which case it takes the form of an admission, and will be conclusive against the party making it, as against any one who may have been induced by it to alter his condition (*l*). Thus a certificate of settlement given by one parish to another, may be conclusive in subsequent proceedings between the parishes (*m*). Or if a vendor represents himself, on the face of a written agreement, as the principal, and the purchaser acts upon it, the vendor cannot afterwards discharge himself from liability by showing that he was agent only (*n*). Again, in an action on a tailor's bill, it

(*i*) *Middleton* v. *Pollock, Ex parte Wetherall*, L. R. 1 Ch. D. 49.

(*k*) *Richards* v. *Johnston*, 1 H. & N. 660, following the rule laid down in *Heane* v. *Rogers*, 9 B. & C. 557.

(*l*) Per Lord Tenterden, C. J., in *Graves* v. *Key*, 2 B. & Ad. 313; per Bayley, J., in *Heane* v. *Rogers*, 9 B. & C. 577; *Farrar* v. *Hutchinson*, 9 A. & E. 641.

(*m*) *R.* v. *Lubbenham*, 1 T. R. 251.

(*n*) *Higgins* v. *Senior*, 8 M. & W. 834.

appeared that defendant had given a bill of exchange for the amount in payment, which had been dishonoured. Held, that the giving of the bill was conclusive against defendant of the amount due at the time when the bill was given (*o*).

Instances of representations of this kind are also furnished by receipts, invoices, and bills of lading. It was formerly decided that a receipt was conclusive as to the fact that the sum therein specified had been paid, and could not be controverted, even where no money really passed, and the transaction was a fraud upon others, *e.g.*, creditors (*p*). But this decision is not in accordance with other old authorities, which laid down that a receipt was not pleadable in bar as an estoppel, being merely a *primâ facie* acknowledgment that the money had been paid (*q*); and it has since been overruled (*r*). And the general rule now is, that a receipt is not of itself conclusive, but may be explained by evidence (*s*). Thus, B., a passenger, who was injured by a railway accident,

(*o*) *Knox* v. *Whalley*, 1 Esp. 159.

(*p*) *Alner* v. *George*, 1 Camp. 392.

(*q*) *Skaife* v. *Jackson*, 3 B. & C. 422; *Straton* v. *Rastall*, 2 T. R. 371; *Graves* v. *Key*, 2 B. & Ad. at p. 318; and 1 Wms. Saund. (ed. 1871), p. 577, note (*c*) and references. Nor was it conclusive, even when indorsed on a deed, *Lampon* v. *Corke*, 5 B. & Ald. 606; except when supported by a statement in the deed itself, *Rowntree* v. *Jacob*, 2 Taunt. 141.

(*r*) *Bowes* v. *Foster*, 2 H. & N. 788; and see per Mellish, J., in *Lee* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 6 Ch. App. 527, at p. 534.

(*s*) See, however, as to pleading in bar an acknowledgment of payment by a receipt in writing, by way of an *estoppel in pais*, *Veale* v. *Warner*, 1 Wms. Saund. (ed. 1871), p. 576.

sent in a claim for £691 compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted £400, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that plaintiff had accepted £400 in full satisfaction and discharge of the causes of action. Plaintiff filed his bill to restrain them from relying on the plea, and from setting up the acceptance of the £400, or the receipt, as a satisfaction or discharge of the damages, except to the extent of £400. The bill did not allege fraud, but that plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time. Held, that as the statement in the receipt could be rebutted by evidence that plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity, and that the bill should be dismissed (*t*). Similarly an invoice does not of itself create an estoppel against the party by whom it was made out (*u*); though it may be conclusive against him as an admission as to the period of credit given for the goods supplied, appearing on the face of it (*x*).

A bill of lading is merely a receipt for goods, and is

(*t*) *Lee* v. *Lancashire & Yorkshire Ry. Co.*, L. R. 6 Ch. App. 527; see also *Roberts* v. *Eastern Counties Ry. Co.*, 1 F. & F. 460; *Ridsal* v. *G. W. Ry. Co.*, 1 F. & F. 706.

(*u*) *Holding* v. *Elliott*, 5 H. & N. 117.

(*x*) *Bacon* v. *Chesney*, 1 Stark. 192.

not, at common law, conclusive as to the amount of the goods shipped, or that in fact any goods were shipped (*y*). But where a shipowner gave a bill of lading, by which it appeared that the freight was paid before the ship's departure, he was held to be estopped, as against the assignee of the bill, from claiming freight on the ship's arrival (*z*). And now, by statute (*a*), every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board; provided that the master, or other person, so signing, may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder holds.

The representation may be made in a variety of ways which may be considered under the following headings:—

1. The representation may be false or fraudulent to the knowledge of the person making it. And in such a case, the onus of proof that the party setting up the

(*y*) *Bates* v. *Todd*, 1 Moo. & Rob. 106; *Berkley* v. *Watling*, 2 N. & P. 178.

(*z*) *Howard* v. *Tucker*, 1 B. & Ad. 712.

(*a*) 18 & 19 Vic. c. 111, s. 3.

estoppel was not induced by it to act to his own damage, lies on the person who made it (*b*).

2. The representation may be not necessarily false to the knowledge of the person making it, but he may have intended that it should be acted upon.

3. The representation may not have been actually intended to be acted upon, but the damage sustained may be such as might be reasonably inferred to result from the representation. In such a case not only the person to whom the representation was made, may set up the estoppel, but so also may any person who has acted upon it, and who might reasonably be supposed to have been intended to act upon it (*c*).

4. The representation must be of an existing fact, and not of a mere intention.

5. Acquiescence or standing by, where there is a duty on the part of the person acquiescing, to speak or assert a right, amounts to a representation by him. But in order for the estoppel to arise, it is essential (α) that such a duty should exist, and (β) that knowledge of the thing done should be brought home to the acquiescing party.

6. Negligence may, under certain circumstances, amount to a representation; but, to act as an estoppel, it must be (α) in the transaction itself, and not merely collateral to it, (β) the proximate cause of the loss or damage sustained, and (γ) the neglect of some duty which is owing to the

(*b*) Per Cranworth, L. C., in *Smith* v. *Kay*, 7 H. L. Cas. 750, at p. 770.

(*c*) See per Lord Cranworth, L. C., in *Jorden* v. *Money*, 5 H. L. Cas. 185, at p. 212.

party by whom the loss or damage is sustained, or to the general public (*d*).

7. The representation must have been acted upon by the party setting up the estoppel, and to his prejudice, and (α) the benefit of the estoppel can only be claimed to the extent of the damage caused by the representation. Moreover, (β) the damage sustained must involve some substantial alteration in the legal position of the party setting up the estoppel (*e*), and (γ) he must show that he acted in the transaction complained of, with ordinary caution (*f*).

8. A representation does not operate as an estoppel, if the party making it is legally incapacitated from entering into the obligation from which the estoppel might otherwise have arisen.

The following cases are given as examples under the above headings :—

1. *False or fraudulent representations.*

A., a prisoner in custody for debt at the suit of B., executes a warrant of attorney in B.'s favour, in the presence of a person whom A. introduces to B. as his attorney. Held, that A. cannot afterwards have the

(*d*) *Freeman* v. *Cooke*, 2 Ex. 654 ; *Swan* v. *North British Australasian Co.*, 7 C. B. N. S. 400 ; 7 H. & N. 603 ; 2 H. & C. 175 ; *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. 578 ; *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. 525 ; *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188.

(*e*) *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188. *Quære*, per Brett, L. J., whether the loss of a remedy under the rules of the Stock Exchange, in consequence of the representation, would be sufficient to raise an estoppel.

(*f*) *Taylor* v. *Great Indian Peninsular Ry. Co.*, 28 L. J. Ch. 285, 710.

warrant of attorney set aside as invalid, on the ground that the supposed attorney was not in reality an attorney at all (*g*).

A. allowed a woman to use his name and to pass for his wife. He was held bound to pay for goods supplied to her, even by a person who knew that the parties were not married (*h*).

In a case of prosecution for forgery, tried before Lord Kenyon in 1782, the prisoner defended himself, and frequently in his speech, alluded to a woman who then accompanied him, as his wife. He afterwards offered her in evidence. But his lordship would not permit it, as the prisoner had spoken of the woman and represented her, as his wife (*i*).

A person who had written prescriptions, and signed M. D. to his name, was held concluded thereby from denying, in an action brought by him for his fees, that he was a physician (and therefore disentitled to sue) (*k*).

In the course of distribution of assets under a will, A., a creditor, misleads the executor, either by laches or express authority, so as thereby to induce the executor to pursue a course in the distribution, which he would not otherwise have pursued. A. is estopped from subsequently complaining of an insufficiency of assets (*l*).

(*g*) *Jeyes* v. *Booth*, 1 B. & P. 97; *Cox* v. *Cannon*, 4 Bing. N. C. 453.

(*h*) *Watson* v. *Threlkeld*, 2 Esp. 637; see also *Robinson* v. *Nahon*, 1 Camp. 245.

(*i*) See a case cited in *Campbell* v. *Twemlow*, 1 Price, at p. 83.

(*k*) *Lipscomb* v. *Holmes*, 2 Camp. 442.

(*l*) *Richards* v. *Browne*, 3 Bing. N. C. at p. 499 (per Tindal, C. J.), cited by Blackburn, J., in *Jewsbury* v. *Mummery*, L. R. 8 C. P. 56, at p. 62.

In an action of trover it appeared that the plaintiff being the legal owner of goods under a mortgage, they were seized whilst in possession of the mortgagor under an execution against the mortgagor, and sold to the defendant for value. Held that, under a plea traversing plaintiff's possession of the goods, the defendant might show that the plaintiff himself authorised the sale, and that the fact of the plaintiff consulting with the execution creditor as to the disposal of the property, without mentioning his own claim, after he knew of the seizure and of the intention to sell, was evidence to go to the jury of authority (*m*).

An Act of Parliament required the transfer of shares in a Railway Company to be by deed. A transfer of certain shares in the company was executed by the seller, with a blank for the purchaser's name, and stating the consideration untruly. The deed was therefore void (*n*). However, the purchaser afterwards signed and transmitted to the company, in pursuance of the Act, a proxy paper describing him as the proprietor of the shares. Held, in an action by the company against the purchaser for calls on the shares, that he was precluded from disputing the validity of the transfer (*o*). Per Parke B., (at p. 582), "The defendant held out false colours, to induce the company to register him as a proprietor, and therefore to bring this action against him. It is a universal

(*m*) *Pickard* v. *Sears*, 6 A. & E. 469.

(*n*) *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Swan* v. *North British Australasian Co.* 7 C. B. N. S. 400; 7 H. & N. 603; 2 H. & C. 175.

(*o*) *Sheffield & Manchester Ry. Co.* v. *Woodcock*, 7 M. & W. 574.

rule of law, that where a party makes a representation to another whereby the situation of the latter is altered, he is bound thereby" (*p*).

A., who had dealt with an agent, had, by his conduct, led the principal to believe that he looked to the agent alone for payment, and had thereby induced the principal after the debt had become due, either to pay the agent the amount, or to allow him to retain it out of the principal's money in his hands. Held that A. was estopped from afterwards resorting to the principal (*q*).

A lessee underlet certain premises, and made certain representations to his under-lessee, as to his (the lessee's) liability to the lessor under the covenants in the lease. He afterwards surrendered his lease to the lessor, thereby absolving himself from the performance of the said covenants. It was held that the underlessee was entitled to an injunction to restrain the lessee from any breach of the said covenants (*r*).

In an action against a Railway Company for injury done to certain horses of plaintiff, whilst being conveyed in the Railway Company's trucks, owing to the defective state of the trucks, defendants paid £25 into Court. At the trial it appeared that when plaintiff delivered the horses to the defendants, he signed, at their request, a declaration that the value of the horses did not exceed

(*p*) *Semble*, that the company would not have been estopped from saying that the purchaser was not a shareholder if it was to their advantage to say so. Cf. *Hare* v. *L. & N. W. Ry. Co.*, Johns. C. C. 722, at p. 726.

(*q*) *McFarlane* v. *Giannacopulo*, 3 H. & N. 860.

(*r*) *Piggott* v. *Stratton*, 29 L. J. Ch. 9.

£10 per horse, and that, in consideration of the rate charged for their conveyance, he thereby agreed that the same were to be carried entirely at his (plaintiff's) risk. The horses were worth more than £10 each, and, if taken at their real value, the damage sustained by the plaintiff was £65, but if valued at £10 each, the £25 paid into Court covered plaintiff's claim. Held, that plaintiff having made a wilfully false statement as to the value of the horses, for the purpose of inducing, and having thereby induced, defendants to enter into the contract, was precluded from showing their real value, in order to obtain compensation beyond the amount paid into Court (*s*). Per Bramwell, B. (at p. 490), "If there be one principle of law more clear than another, it is this, that where a person has made a deliberate statement, with the view to induce another to act, and he has acted upon it, the former is not at liberty to deny the truth of the statement so made. I think it would be most mischievous if he could."

B., a surveyor, knowingly omitted certain items from accounts. Upon the faith of this omission, trustees acted. Held, that B. was estopped from afterwards recovering the sums omitted (*t*).

A. grants authority to another to conduct a business in his name, in which business, in point of fact, A. has no

(*s*) *McCance* v. *L. & N. W. Ry. Co.*, 7 H. & N. 477.

(*t*) *Cave* v. *Mills*, 7 H. & N. 913 (Bramwell diss.); but it was held that this did not apply to an account which the trustees had not accepted as true. And an omission in accounts, made by mistake, does not necessarily create an estoppel. See *Sutton* v. *Tatham*, 10 A. & E. 27; *Dails* v. *Lloyd*, 12 Q. B. 531. See further as to an estoppel arising from accounts, *Van Hasselt* v. *Sack*, 13 Moo. P. C. C. 185, *post*, p. 320.

interest. Third persons enter into transactions with the firm, under the belief induced by the misrepresentation, that they are contracting with A. A. will be estopped, as against such third person, from assuming any position inconsistent with that which he so held himself out as occupying (*a*).

Two of the directors of a joint-stock company, by letter to the company's bankers, notified that their manager had authority to draw cheques on account of the company. The company's account was at the time overdrawn, and that fact was known to the two directors. The bankers honoured the manager's cheques, on the authority so given them. Held, that the two directors were personally liable to the bank on their representation (*c*).

W., having entrusted P., his solicitor, with a sum of £7,700 for investment on mortgage on his behalf, was informed by P.'s clerk, in conversation, that P. proposed to invest the money on mortgage of certain leasehold property at Camden Town at 5 per cent. W. subsequently received a letter from P., stating as follows:—"The money is put on 5 per cent. mortgage as arranged by my clerk with you." On P.'s death it was found that no mortgage existed in favour of W., but that P. had advanced £100,000 to a firm of builders on a mort-

(*a*) *Miles* v. *Furber*, L. R. 8 Q. B. 77.

(*c*) *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24; and see the comments thereon by Cairns, L. C., in *Beattie* v. *Ebury*, L. R. 7 H. L. 102, where a mere authority to a bank to honour certain cheques was held in the absence of any misrepresentation or error, not to make the directors who gave it, themselves personally liable.

gage of their leasehold property at Camden Town. W. brought a creditor's action for the administration of P.'s estate. Held, that P., and those claiming under him, were bound by the representation made by him, and were estopped from saying that the £7,700 had not been advanced as directed, and from denying that it formed part of the £100,000 so invested (*y*).

Defendants employed one F. to buy barley and to malt it for them only. F., for the purpose of purchasing such barley, was empowered to draw upon a certain fund paid into a bank in the name of defendants. F. bought barley upon credit, and at the same time fraudulently drew out money from the fund so supplied by defendants, representing by his conduct that the money so drawn out was used for the purpose of paying for barley approved of by defendants. F. also bought malt which he represented to have been made from barley bought with defendants' money. Defendants, F. having become bankrupt, seized all the barley and malt upon his premises, the value of which was less than the moneys which he had drawn out. In an action brought by the trustee in F.'s bankruptcy, to recover the value of the barley and malt so seized :—Held, that the relation created by the course of business between defendants and F. was that of principal and agent ; that the barley and malt which were seized by defendants, were charged on trust with the amount of the price, which was, or ought to have been, and which F. represented by his conduct to have been, paid for them with defendants' money ; and that,

(*y*) *Middleton* v. *Pollock, Ex parte Wetherall*, L. R. 4 Ch. D. 49.

as F. (who had never been reputed owner) was estopped from saying that he was not trustee of the barley and malt for defendants, the trustee in his bankruptcy was also estopped from disputing the equitable right of defendants to the same (*z*).

Further illustrations are afforded by cases in which a marriage has taken place on the faith of the representation, as follows :

A., in order to make it appear that his sister had a fortune of £500, whereas in truth she had only £350, gave her a sum of £150, so as to make up the £500, and she gave him a bond for the amount. After the marriage had taken place upon the faith of the gift, it was held that the bond could not be enforced, and it was ordered to be delivered up to be cancelled (*a*).

Joseph Montefiori, a Jew, being engaged in a marriage treaty, his brother Moses, to assist him and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of account between him and his brother Joseph, which balance he (Moses) acknowledged to have in his hands. In truth no such balance, or anything like it, existed. The marriage took place, and then Moses reclaimed the note as being given on no consideration. The matter was referred to arbitration, and the arbitrators awarded the note to be given up, but Lord Mansfield set aside the award. He said "the law is, that where, upon proposals of marriage, third persons represent anything material in a light different from the truth, even

(*z*) *Harris* v. *Truman, Hanbury & Co.*, L. R. 9 Q. B. D. 264.

(*a*) *Gale* v. *Lindo*, 1 Vern. 475.

though it be by collusion with the husband, they shall be bound to make good the thing in the manner as represented to be" (*b*).

A marriage took place upon the faith of A.'s statement as to the husband's debts, the statement involving the concealment of a debt which the husband owed to A. himself. After the marriage had taken place, A. was restrained from taking proceedings to recover his debt (*c*).

2. *Representations not necessarily false to the knowledge of the person making them, but intended to be acted upon.*—H., who was in prison under a *capias ad satisfaciendum*, was permitted, at his own request, to reside outside the prison, under the surveillance of an officer:—Held, that he was estopped from saying that the custody in which he then was, was not the custody of the sheriff's officer, as both parties had intended it to be so (*d*).

A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority without giving notice to the tradesman, is estopped from denying the servant's authority to bind him (*e*).

A person who had given in a schedule on oath of all his debts to the Insolvent Debtors' Court was held to be

(*b*) *Montefiori* v. *Montefiori*, 1 Sir W. Bl. 363.

(*c*) *Neville* v. *Wilkinson*, 1 Bro. C. C. 543; see also the case as referred to by the L. C. in *Vauxhall Bridge Co.* v. *Spencer*, Jacob's Rep. 67; and see *Shirley* v. *Ferrers*, cited in 11 Ves. junr. 536.

(*d*) *Haines* v. *East India Co.*, 11 Moo. P. C. C. 39; see also *Tyerman* v. *Smith*, 25 L. J. Q. B. 359; and *Andrews* v. *Elliott*, 25 L. J. Q. B. 1.

(*e*) Per Erle, C. J., in *Swan's Case*, 7 C. B. N. S. 400.

concluded from afterwards claiming a debt not included in the schedule (*f*).

Land was taken under powers given by Act of Parliament. A., whose land was taken, waived the necessity for the statutory notice to treat for compensation, in order that the inquiry might take place earlier. The jury assessed the compensation, and afterwards A. applied for a *certiorari* to quash the inquisition, on ground of insufficient notice:—Held, that he was estopped by his waiver, and the application was refused (*g*).

A., upon notice to produce a document in his possession, refuses to produce it, and thereby causes the opposite party to give secondary evidence of its contents. A. is estopped from himself producing the document in evidence (*h*).

A. brought an action against B. for £121 odd, the price of certain goods supplied to B. A. authorised E. to come to an arrangement with B. in settlement of the action. E. thereupon agreed with B. that he should have the goods for £50:—Held that A. could not afterwards repudiate E.'s arrangement, on the ground that he had given him secret instructions not to settle for less than £100 (*i*).

Agents furnished coals for voyages of a steamer in 1856. As agents they recovered the freights payable in

(*f*) *Nicholls* v. *Downes*, 1 Moo. & Rob. 13.

(*g*) *R.* v. *South Holland*, 8 A. & E. 429.

(*h*) *Doe* d. *Thomson* v. *Hodgson*, 12 A. & E. 135.

(*i*) *Trickett* v. *Tomlinson*, 13 C. B. N. S. 663; cf. *Mullens* v. *Miller*, L. R. 22 Ch. D. 194; and *Miles* v. *McIlwraith*, L. R. 8 App. Cas. 120.

London, and paid thereout the steamer's expenses incurred in England, and forwarded a debit and credit account of each voyage to the owners :—Held, that by having appropriated in the accounts the receipts to specific items, *e.g.*, coals, they were estopped by their accounts, from appropriating them to a previous agency account for the ship, and from suing for the coals as necessaries supplied and unpaid for (*k*).

A purchaser deposited a certain sum on a contract for the sale of a leasehold shop. The agreement was signed by the auctioneer as "agent for the vendor," and by the purchaser. Subsequently the purchaser obtained an abstract of the title, which was examined by her solicitors who made certain requisitions as to title "without prejudice to any question which may arise as to the contract for the purchase of the premises." Afterwards the purchaser declined to complete the purchase, on the ground that the contract was void, as the parties to it were not sufficiently described :—Held, that although the memorandum might be insufficient under the Statute of Frauds, yet, as the purchaser had paid the deposit and received the abstract of title, well knowing that the vendor's name did not appear in the memorandum, and while the vendor was ready to complete the contract, she was estopped from recovering her deposit (*l*).

Defendant took certain shares in plaintiff's company.

(*k*) *Van Hasselt* v. *Sack*, 13 Moo. P. C. C. 185 ; see also *The West Friesland*, 1 Sw. Adm. Cas. 456. And see further as to an estoppel arising from accounts, illustration, *ante*, p. 314, note (*t*).

(*l*) *Thomas* v. *Brown*, L. R. 1 Q. B. D. 714.

He afterwards wrote to the company, stating that he held certain shares, and claimed to be registered as a proprietor of them, at the same time enclosing the scrip. The company gave him a receipt, and duly registered him as proprietor of the shares. Defendant, however, never applied for sealed certificates, and there was no transfer of the shares to him by deed, as provided by the Act. Defendant paid some calls on the shares. In an action against him by the company for further calls, held, that he was estopped from denying his ownership of the shares (*m*).

T. being the registered holder of five shares in a registered joint stock company (limited), left the share certificates in the hands of her broker. A transfer of the shares to S. and G., purporting to be executed by T., together with the certificates, was left with the secretary for registration. The secretary in the usual course wrote to T., notifying that the transfer had been so left, and, receiving no answer after ten days, registered the transfer, and removed the name of T., and placed the names of S. and G. on the register as holders of the five shares, giving them certificates certifying that they were the registered holders of the five specific shares. A. bargained for five shares through brokers in the usual way on the Stock Exchange, and paid the value of five shares, and the specific shares were transferred to him by S. and G., and the name of A. was registered as the holder of the shares, and share certificates were given to him. It was afterwards

(*m*) *Cheltenham, &c. Co.* v. *Daniel*, 2 Q. B. 281.

discovered that the transfer to S. and G. was a forgery, and the company was ordered to restore T.'s name to the register by rule of court under the Companies' Act, 1862 (25 & 26 Vict. c. 89, sec. 35). Held, that the giving of the certificate by the company to S. and G. amounted to a statement by the company, intended by the company to be acted upon by purchasers of shares in the market, that S. and G. were entitled to the shares, and that, A. having acted upon that statement, the company were estopped from denying its truth (*n*).

Plaintiff bought and paid for shares in defendants' company, and received duly executed transfers and share certificates, but was not registered as holder of the shares. The seller of the shares, being afterwards compelled to pay a call upon them, demanded repayment of plaintiff, who required to have the transfer completed by registration. Plaintiff's name was thereupon entered on the register, and he received from the company a certificate certifying that he was owner of the shares. Subsequently, on the faith of such registration and the delivery of the certificate, he repaid to the seller the amount of the call. Defendants afterwards discovered that, before plaintiff bought the shares, they had been sold by a previous owner, by a duly executed transfer, to F., and they accordingly removed plaintiff's name from the register, and substituted F.'s name. In an action by plaintiff against defendants for the removal

(*n*) *In re Bahia & San Francisco Ry. Co., in re Trittin*, L. R. 3 Q. B. 584; and see *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642.

of plaintiff's name, held that, by the registration of plaintiff, and the delivery to him of the certificate, followed by the payment by him of the call, defendants were estopped from denying his title to the shares, and were liable to him for their value (*o*).

C. transferred ten shares in a cost-book mining company to A. for £5. The transfer was registered. The company, having suspicions as to A.'s means, asked for information about him, but got none. They made calls upon him, and, on non-payment, recovered judgment for the amount, but obtained nothing. About two years afterwards the company was ordered to be wound up. The liquidator sought to put C. upon the list of contributories on the ground that the transfer was fraudulent within sec. 35 of the Stannaries Act, 1869. Held, that the Court could only act in the winding-up as the company could have acted if there had been no winding-up, and that, as the company would have been estopped by having recognized the transfer with knowledge, the Court could not set it aside (*p*).

An urban authority, under powers given to them by statute (*q*), give notice to the owners of certain premises requiring them to do certain works within a prescribed period, and stating that if such works are not executed the urban authority will execute the same themselves at

(*o*) *Hart* v. *Frontino & Bolivia, &c. Co.*, L. R. 5 Ex. 111; see also *Foster* v. *Mentor Life Assurance Co.*, 3 E. & B. 48, where the court were equally divided in opinion.

(*p*) *Wheal Unity Wood Mining Co., In re Chynoweth's Case*, L. R. 15 Ch. D. 13.

(*q*) Public Health Act, 1875 (38 & 39 Vic. c. 55), s. 150.

the owners' expense, and that "the said urban authority will thereupon also proceed to declare all costs, charges, and expenses, paid, expended, or incurred by them in consequence of such neglect or default, to be private improvement expenses." Held, that the urban authority were estopped by their declared intention to treat the expenses incurred as private improvement expenses from proceeding against the owners summarily for the recovery of such expenses (*r*).

3. *Representations in cases where the damage sustained is the result of a reasonable inference from such representations.*

G., the foreman of plaintiff, a lithographic printer, who was employed by him to get orders for printing, being desirous of publishing certain maps and other works on his own account, agreed with defendant, a publisher, to supply maps, &c., to him, to be sold on commission. He then entered an order, as from defendant, in plaintiff's order book, but without defendant's authority. Maps and other goods were supplied to defendant from plaintiff's premises, some of them accompanied by delivery notes, requesting defendant to receive the goods from plaintiff. Receipts to the same effect were signed by defendant. Plaintiff made out an account, amounting to £100, charging defendant with the amount, and handed it to G., who shewed it to defendant. Defendant accepted bills for a part of the amount of this account, and gave the balance in cash to G., who handed the cash and bills to plaintiff. Other goods being supplied,

(*r*) *Gould* v. *Bacup Local Board*, 50 L. J. M. C. 44.

plaintiff sent the invoice of them to defendant, charging him with the price. Defendant then applied to G. for an explanation, and, on being told by G. that it was a mistake, took no steps to inform plaintiff of the matter. Plaintiff then brought an action against defendant for the price of the goods last supplied to him. The jury at the trial found, (1) That defendant did not authorise G. to use his name in ordering the work to be done; (2) that the manner in which defendant signed the receipts was such as to induce plaintiff to think that he was buying the goods on his own account. Upon these findings the judge (Martin, B.) directed a verdict to be entered for the plaintiff (*s*). This verdict was upheld *in banc*, when Bramwell, B., said (*t*), "The rule is, that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it."

W. B., the owner of certain goods, in anticipation of a distress, removed them to the house of J. B., and afterwards to the house of B. B. A writ of *fi. fa.* having been issued against J. B. and B. B., the sheriff's officer, in execution of the writ, entered the house of J. B., and found there W. B.'s goods. W. B., thinking that the writ was out against himself, represented to the sheriff's officer that the goods in question belonged to J. B. The sheriff's officer then produced the writ; whereupon, W. B., perceiving that the writ was out against J. B. and B. B., told the officer that the goods belonged to another

(*s*) *Cornish* v. *Abington*, 4 H. & N. 549; and see *Thomas* v. *Brown*, L. R. 1 Q. B. D. 714.

(*t*) At p. 556.

brother of his, and finally that they belonged to himself. The sheriff's officer, however, proceeded to seize the goods, and to sell them as those of B. B. W. B. afterwards became bankrupt, and his assignees brought an action of trover and conversion of the goods against the sheriff's officer. Defendant pleaded (*inter alia*) that W. B. was not possessed of the goods at the time of seizure. The jury found that though the goods in fact belonged to W. B., he represented them to the sheriff's officer as the goods of B. B., so as to induce him, by that false representation, to seize the goods. Upon this finding the judge directed a verdict for the plaintiff, and the direction was upheld *in banc* (*u*). Parke, B., after stating the rule above mentioned, said, "If we apply this rule, either in the terms in which it was enunciated in *Pickard* v. *Sears* (*v*), or as it is above expounded, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of not possessed. It is not found that he intended to induce the officer to seize the goods as those of B. B., and, whatever intention he had on his first statement, was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of W. B.'s representation."

Goods having been ordered by E., were invoiced to "E. and Son," and a bill was drawn for the price on "E. and Son." The bill was accepted in the handwriting of the son, in the name of "E. and Son." The son was not

(*u*) *Freeman* v. *Cooke*, 2 Ex. 654.

(*v*) 6 A. & E. 469.

a partner, and it was alleged that he accepted the bill only as his father's amanuensis. *Per* Watson, B.: The proper question to have been put to the jury should have been as follows, viz., whether the conduct or statements of the son led plaintiff to believe that the son and E. were in partnership together, and whether plaintiff acted on that belief. If the jury answered this question in the affirmative, that then the son was liable on the bill (*x*).

On the dissolution of a partnership between H., C., and P., notice was given to the creditors that the business would thenceforth be carried on by P. alone, under the firm of P., Son, & Co. After this the business was carried on under that firm, and a banking account was opened in that name. P.'s son constantly signed cheques upon that account in the name of the firm. He also accepted bills in the name of the firm, negotiated loans to the firm, and sometimes ordered goods in the name of the firm. The name P. alone appeared on the outside of the business premises. The business was continued for a year and a half, and then P. and his son were, on the petition of a creditor of the business, jointly adjudicated bankrupts, as having traded as partners. On an application to the Court for a declaration that the assets of the business were separate estate of the father, both father and son deposed that no actual partnership had subsisted between them, but that it was intended from the first that the son should be a partner if the business had turned out profitable. Two creditors (the petitioning creditor and another)

(*x*) *Gurney* v. *Evans*, 3 H. & N. 122; see also *Mollwo March & Co.* v. *Court of Wards*, L. R. 4 P. C. at p. 135.

deposed that the son had been held out to them as a partner. Eight other creditors (the whole number who had proved being eighty-two) deposed that they had always treated the son as being a partner. Held, that the assets must be treated as joint estate of father and son (*y*).

The purchaser of hemp lying at a wharf, himself directs the hemp to be transferred, in the wharfinger's books, into the name of the broker who had bought it for him. From this an authority to the broker to sell would be implied, though no such authority was in fact given him, and the sale and receipt of the money, by the broker, though fraudulent as to the principal, would nevertheless bind him (*z*).

B. fraudulently obtains goods from F. H. (whose ordinary business is that of a cotton broker, and who is utterly ignorant of B.'s fraud), purchases the goods from B., in the belief and expectation that M., one of his ordinary clients, would accept the goods. M. does accept them; H., at the time of the purchase, had no instructions

(*y*) *Ex parte Hayman, In re Pulsford*, L. R. 8 Ch. D. 11, following *In re Rowland and Crankshaw*, L. R. 1 Ch. App. 421. And for further cases, showing the principle upon which a person not actually a partner becomes treated as one by holding himself out as such, see per Erle, C. J., in *Waugh* v. *Carver*, 2 H. Bl. 235; *Fox* v. *Clifton*, 6 Bing. 776: per Williams, J., in *Martyn* v. *Gray*, 14 C. B. N. S. 824, at p. 841; and other references in Lindley on Partnership (4th ed.), vol. i., pp. 47 *et seq.* And, as to the personal liability of persons who, though merely trustees for others of shares in an incorporated company, have held themselves out as individually liable, see *Cree* v. *Somervail*, L. R. 4 App. Cas. 648, following *Oakes* v. *Turquand*, L. R. 2 H. L. 325; and *Muir* v. *City of Glasgow Bank*, L. R. 4 App. Cas. 337.

(*z*) *Pickering* v. *Busk*, 15 East, 38; and see *Boyson* v. *Coles*, 6 M. & S. 14.

from any principals to make a purchase. Held, that H. by his conduct had made himself liable to be treated as a principal, and, by transferring the goods to M., had committed an act of conversion, which made him liable in trover to F., the real owner of the goods (*a*).

A. hands his watch to B. to keep for him. B. sells or pledges it. A., though in a sense he enabled B. to appear as the owner of the watch, does not lose his property therein, and is not estopped from recovering the watch from the purchaser or pledgee (*b*).

A. deposits with his broker, negotiable instruments transferable by delivery. The broker, in fraud of A. and without his authority or knowledge, deposits them with B. as security for a sum owing from the broker to B. A. is estopped from recovering them from B. (*c*).

H., a merchant dealing in tobacco and a broker in that trade, has fifty hogsheads of that article, lying in bond in his name in the K. dock, the warrants for which have been issued to him. Plaintiff buys the tobacco from H., and pays for it, but he leaves the dock warrants in the possession of H., and takes no steps to have any change made in the books of the dock company, as to the ownership of the tobacco. H., being the ostensible owner of the tobacco, fraudulently obtains advances, on the pledge of a portion of the tobacco, from defendants, and hands to

(*a*) *Hollins* v. *Fowler*, L. R. 7 Q. B. 616; L. R. 7 H. L. 757; see also *Stephens* v. *Elwall*, 4 M. & S. 259; *Hardman* v. *Booth*, 1 H. & C. 803.

(*b*) Per Bramwell, B., in *Gabarron* v. *Kreeft*, L. R. 10 C. P. at p. 281.

(*c*) *Rumball* v. *Metropolitan Bank*, L. R. 2 Q. B. D. 194; and *post*, p. 368, following *Goodwin* v. *Roberts*, L. R. 10 Ex. 337; L. R. 1 App. Cas. 476.

them the dock warrants. Defendants act in good faith, and take fresh dock warrants from the dock company. Plaintiff brings an action against defendants for the tobacco. Plaintiff is not estopped from recovering it from them (*d*).

A., the owner of goods, allows a factor B. to have possession of the goods, or of the documents of title to the goods, thereby enabling B. to hold himself out to the world as having, not only the possession, but the property in the goods. B. sells the goods without giving A. notice. A. is bound by the sale, and is estopped from recovering the goods from the vendee (*e*).

A contract was entered into for the sale by B. and D. to a company, of certain property, and for the issue and delivery to B. and D., immediately upon the formation of the company, of debentures to the amount of £150,000

(*d*) *Johnson* v. *Credit Lyonnais Co.*, L. R. 2 C. P. D. 224; L. R. 3 C. P. D. 32. But see now the Factors' Acts Amendment Act (40 & 41 Vic. c. 39, s. 3).

(*e*) *Dyer* v. *Pearson*, 3 B. & C. 38; and per Cockburn, C. J., in *Johnson* v. *Credit Lyonnais Co.*, L. R. 3 C. P. D. 32, at p. 39, commenting on and qualifying the doctrine laid down in Chitty on Contracts (10th ed.), p. 355. Purchasers, pledgees, and others, dealing with factors, agents, and others, who are in possession of goods, are in many cases protected by the Factors' Acts (4 G. 4, c. 83, 6 G. 4, c. 94, 5 & 6 Vic. c. 39, and 40 & 41 Vic. c. 39), which, in such cases, create a statutory estoppel against the owner of the goods, preventing him making any subsequent claim to the goods so dealt with. No protection, however, is afforded to them at common law, against claims by the owner, except in cases of estoppel like those given in the illustration; see *Paterson* v. *Tash*, 2 Str. 1178; *Daubigny* v. *Duval*, 5 T. R. 604; *Martini* v. *Coles*, 1 M. & S. 146; and, except as to certain rights of set off; see *George* v. *Clagett*, Smith's L. C. (8th ed.), vol. ii., p. 118.

which were to be payable to bearer, the capital to be repayable to bearer at the end of three years from the date of the agreement. The contract was embodied in the Articles of Association, and the company was formed to give effect to it. Held, upon a claim being made by holders of the debentures to prove for the amount specified in them, that the company was estopped from setting up any equity, or right of set-off or counter-claim, which it might have acquired against B. and D. to whom the debentures were originally issued (*f*).

P., residing at Honfleur, consigned butter to plaintiff by the defendants but wrote to plaintiff that he would send no more until he heard further. Defendants' agent at Honfleur wrote to plaintiff, stating that 17 barrels of butter were consigned to him, whereas they had been delivered to the defendants by P. without address. Plaintiff paid the carriage charged by defendants, and accepted a bill drawn by P. for the value of the butter. Defendants

(*f*) *In re Blakely Ordnance Co., Ex parte New Zealand Banking Corporation*, L. R. 3 Ch. App. 154. The estoppel in this case arose out of the contract by the company to issue debentures "payable to bearer." This implied a representation that the holder should be free from prior equities, &c. No such estoppel would arise on a contract by a company to issue debentures bearing interest, but not saying anything about the form of the debentures, even though the debentures actually issued were in the form of an undertaking by the company to pay a certain sum to "C., or to his executors, administrators, or transferees, or to the holder for the time being of the debenture bond." See *In re Natal Investment Co.*, L. R. 3 Ch. App. 355, explained in *Ex parte City Bank*, L. R. 3 Ch. App. 758; and see *In re Romford Canal Co.*, L. R. 24 Ch. D. 85, at p. 92. In such a case the ordinary rule as to the liabilities of assignees of choses in action would apply see *post*, p. 346, note (*k*).

afterwards, at P.'s request, delivered the butter to another person. Plaintiff then sued defendants for the amount of his acceptance and for the amount he had paid for carriage, which latter amount defendants paid into court: held, that the inaccurate statement made by defendants was not made with the intention that plaintiff should act upon it, and that plaintiff's act, *i.e.*, presumably, the acceptance of the bill, was not the reasonable consequence of the statement, and that therefore the fact did not amount to an estoppel which rendered defendants liable for the value of the butter (*g*).

Plaintiffs delivered to defendants, for carriage on board defendant's ship, a closed case containing silk goods. The bill of lading, as tendered by plaintiffs for signature, described the contents of the case as linen goods, but before signing, the captain impressed upon it with a stamp the words "weight, value, and contents unknown." The freight charged for silk was higher than that for linen goods, and the freight paid for the goods was that for linen goods; but plaintiffs represented the goods to be linen inadvertently and without fraudulent intention. On the ship's arrival at her destination it was found, that two pieces of silk had been abstracted from the case. In an action by plaintiffs against defendants as common carriers, for non-delivery of the silk goods so lost: held, that the result of the addition of the words "weight, value, and contents unknown," to the bill of lading was completely to do away with the effect of the description of the goods as linen, and that consequently defendants'

(*g*) *Scales* v. *L. & S. W. Ry. Co.*, 53 L. T. (O. S.) 44.

contract was to carry the case and its contents, whatever they might be, and that plaintiffs were entitled to maintain the action (*h*).

Plaintiff bought goods which were to be consigned to him at Liverpool from St. Helen's by defendants' railway. On the 7th of July 1873, plaintiff received an advice note from defendants informing him that two parcels of goods had been received by them for his account, and that they held them subject to his order and to the payment of rent and charges. One of those parcels, through a mistake of the consignors and a consequent mistake of defendant company, was wrongly described in the advice note. The consignors and defendant company having discovered their mistake, it was corrected by means of a "corrected" advice note, sent as before, on the 9th of July, which correctly described the parcel which before had been wrongly described, but which was not on paper of the colour ordinarily used for corrected advice notes. Plaintiff appears to have thought that the "corrected" advice note referred to a third parcel of goods, and immediately instructed his broker to sell the whole three parcels. Early in August the plaintiff received invoices of the three parcels from the consignors and paid for the whole by an acceptance which was duly honoured. The goods were sold on the 21st of August, and the rent and charges on the three parcels were paid

(*h*) *Lebeau* v. *General Steam Navigation Co.*, L. R. 8 C. P. 88. *Quære*, whether even without the additional words, the misrepresentation, having been made without fraud, could have had the effect of avoiding the contract for carriage of the goods by defendants as common carriers.

to defendants by the broker, but it turned out that two parcels only had been delivered to defendants (the third still remaining on the premises of the consignors), and plaintiff was obliged to pay his purchasers the difference between the price at which they had bought the third parcel, and what they had to pay for other goods. The mistake was not made known to all parties until after the sale of the three parcels, and delivery of two of them, and a demand made by the purchaser for the delivery of the third. Plaintiff then brought an action against defendant company for non-delivery of the third parcel. The jury found at the trial, "that defendants knew of the mistake on the 9th of July, and that there was no sufficient intimation by the defendants to the plaintiff of the mistake." They did not, however, find any negligence on the part of the defendants. Held, that defendants were not estopped from shewing that the goods had never reached their hands; and consequently could neither be liable in trover, nor for breach of contract in not delivering the goods (*i*). Brett J. in his judgment, after stating the propositions applicable to estoppels in pais, above mentioned (*k*), said, "It cannot, as it seems to us, be truly affirmed, that the defendants intended any representation of theirs to be acted upon by the plaintiff in the way of reselling the goods . . . the only intention on the part of the defendants which can be properly inferred from the sending of an advice note is, that the consignee should send for the goods . . . the plaintiff did not,

(*i*) *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307.

(*k*) See *ante*, p. 303.

in re-selling, *act* upon any representation of the defendants, for he resold before they made any communication to him. In re-selling, he neither acted upon nor was damaged by reason of any representation of theirs. And, if the second intention be inferred, the plaintiff did not act upon it by sending for the goods; he never did send for them" (*l*).

C. was proprietor of certain stock in the London and South Western Railway Company. P., the confidential clerk of C., feloniously got possession of a certificate for £1,000 of the stock, and sold that amount. Subsequently he forged C.'s name to the transfer, and forwarded it, together with the certificate, to the brokers of W. the purchaser, who had purchased the stock from T. a member of the Stock Exchange. The brokers forwarded the transfer and certificate to the company for registration. The company thereupon wrote to C. at his usual address, inquiring if the transfer was correct. The letter was intercepted by P., who replied in a way which appeared not quite satisfactory. The company forwarded a second letter, which was also intercepted by P., who gave the company an explanation with which they were satisfied, and they immediately sent a new certificate to W.'s brokers. The fraud was subsequently discovered, and W. sought to recover from the company on the ground (*inter alia*) that he was entitled to rely upon the certificate of registration, which the company were

(*l*) Cf. *Coventry* v. *G. E. Ry. Co.*, L. R. 11 Q. B. D. 776, in which there was negligence on the part of the company, *post*, p. 370.

estopped from questioning, as it had prejudicially altered his position. Held, that the company having issued the certificate to W., without any want of care, and in a *bonâ fide* manner, were not estopped from contesting its validity (*m*).

4. *The representation must be of an existing fact, and not of a mere intention.*—W. M. gave a bond and warrant of attorney to secure the repayment of a sum of money. An action was brought thereon, and judgment entered up, but not executed. The bond and warrant of attorney subsequently came into the possession of L., as personal representative of the original obligee. L. was on terms of affectionate friendship with W. M., and often said that he had been unfairly treated, in being made to enter into these securities. L. had, in early life, received from W. M.'s father, a conveyance of some property in India. The deed of conveyance was expressed to be for a money consideration of 10,000 rupees. In truth the consideration was, if any, a debt of 1,200 rupees, and the rest was a purely voluntary gift, and no money whatever passed, when the conveyance was executed. W. M. was about to marry, and when his marriage was in contemplation, discussions arose about the bond and warrant of attorney. W. M.'s father told L. that he was advised, if she did not abandon the claim on the bond and warrant of attorney against his son, to execute a deed which would put an end to the conveyance of his Indian property as a voluntary conveyance. L. therefore promised not to enforce the bond and warrant of

(*m*) *Waterhouse* v. *L. & S. W. Ry. Co.*, 41 L. T. 553.

attorney, if he would abstain from interfering with the conveyance. Other evidence was given of declarations by her, that she "had abandoned" the claim, and of a promise often repeated, that she would never trouble W. M. about it. W. M.'s marriage took place, and property of the lady to whom he was engaged was settled on him for his life, upon the faith of the representations made by L. that she would never call for the bond. After the marriage, W. M. instituted a suit in Chancery, praying that he might be released from the bond, that the warrant of attorney might be delivered up to be cancelled, and that satisfaction might be entered up on the judgment obtained against him. Held, in the House of Lords, that plaintiff's bill must be dismissed, but without costs (*n*). Per Lord Cranworth, L. C., after citing the cases of *Montefiore* v. *Montefiore* (*o*), *Neville* v. *Wilkinson* (*p*), and Baron Parke's judgment in *Freeman* v. *Cooke* (*q*):. "The question is, whether the evidence

(*n*) *Jorden* v. *Money*, 5 H. L. Cas. 185. The judgments were those of Lord Cranworth (L. C.) and Lord Brougham, *dissentiente* Lord St. Leonards. The latter was of opinion that a representation of intention was sufficient to raise an estoppel. The judgment of the majority, however, has been approved of in several more recent cases in the House of Lords. See per Lord Selborne in *Citizens' Bank of Louisiana* v. *First National Bank of Orleans*, L. R. 6 H. L. 352, at p. 360; *Thompson* v. *Simpson*, L. R. 5 Ch. App. 659; and *Maddison* v. *Alderson*, L. R. 8 App. Cas. 467, at p. 473. The only authority against it has been *Loffus* v. *Maw*, 3 Giff. 592, followed by Malins, V.C., in *Coles* v. *Pilkington*, L. R. 19 Eq. 174. But this has been disapproved of in *Maddison* v. *Alderson*, L. R. 8 App. Cas. 467, at pp. 473, 483.

(*o*) 1 Sir W. Bl. 363, *ante*, p. 317.

(*p*) 1 Bro. C. C. 543, *ante*, p. 318.

(*q*) 2 Ex. 654.

here shows that anything took place which brings the case within those authorities. I am clearly of opinion, as clearly as I can be, knowing that I am counter in this respect, certainly to an authority for which I feel very great deference, namely, the Master of the Rolls, probably to the Lords Justices, and I have some reason to suppose, also to some at least of your lordships, that it does *not*. I am bound to state my view of the case; I think that that doctrine does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not."

Defendants sold B. and Co., 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract, four several documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon, twenty-five tons of merchantable sheet zinc off your contract of this date." Upon the faith of these documents, plaintiffs bought of B. and Co., and paid for, fifty tons of the zinc mentioned in the contract. B. and Co. having failed, and the contract price being unpaid, defendants refused to deliver the zinc. Held, that the giving of these delivery orders, or "undertakings" did not estop defendants from setting up as against the vendees of B. and Co., their right, as unpaid vendors, to withhold delivery (*r*). Per Brett, L. J., (referring to the delivery order), "looking at it, it obviously contains no representation of any fact, and the

(*r*) *Farmeloe* v. *Bain*, L. R. 1 C. P. D. 445.

plaintiffs had no right to rely upon it as such a representation, and consequently they do not bring themselves within either of the propositions as to estoppel which I ventured to lay down in *Carr* v. *London and North Western Ry. Co.* (*s*) and to which I still adhere. It was a mere undertaking or contract between the plaintiffs and their immediate vendees."

The following classification of the different kinds of representation has been made by Stephen, J., in a recent case (*t*). "It seems to me," says the learned judge, "that every representation false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation, liable, either to damages, or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel, preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard* v. *Sears* (*u*), and many other well-known cases, are instances of representations amounting to an estoppel. A false pretence by which money is obtained, is an instance of a representation amounting to a crime. Besides these,

(*s*) L. R. 10 C. P. 307, *ante*, p. 303.

(*t*) *Alderson* v. *Maddison*, L. R. 5 Ex. D. 293, at p. 296.

(*u*) 6 A. & E. 469.

there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it. It will, I think, be found, that all the difficulties of the subject may be solved by keeping in mind this classification of the different classes of false representations."

It does not therefore necessarily follow, that because a representation is of a mere intention and therefore has no effect by way of estoppel, the party who has acted upon it to his prejudice has no legal remedy which he can avail himself of, although in certain cases it may be so. Thus where the representation is verbal and is made with respect to some matter that comes within the Statute of Frauds, for instance, in consideration of marriage or of the sale of lands, and there has been no part performance of it so as to take the case out of the Statute, it cannot be enforced, and the party who has acted on it has no remedy. But it appears from the judgments given in *Maddison* v. *Alderson* (*r*), that where representations of

(*r*) L. R. 8 App. Cas. 467, at p. 473.

mere intention have been enforced, and of this there are several examples (*x*)—they must be held to have been enforced as contracts, but that in all other cases representations of mere intention would not now be enforced either at law or in equity (*y*).

5. *Acquiescence or standing by, where there is a duty to speak or assert a right.*—As already pointed out (*z*), in order to show that vested rights are abandoned, the representation must amount to a licence or agreement. Thus mere permission to use a right of way under a special agreement does not operate as an estoppel, as between the party permitting such user and strangers, after the termination of the agreement (*a*).

The following cases are examples of acquiescence :—

A bankrupt acquiesced in his commission of bankruptcy

(*x*) See *Cookes* v. *Mascall*, 2 Vern. 200; *Wankford* v. *Fotherley*, 2 Vern. 321; *Hodgson* v. *Hutchenson*, Vin. Ab., vol. v., p. 522; *Luders* v. *Anstey*, 4 Ves. 501; *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; *Caton* v. *Caton*, 34 L. J. Ch. 564; *Prole* v. *Soady*, 2 Giff. 1; *Yeomans* v. *Williams*, L. R. 1 Eq. 184; and *Ungley* v. *Ungley*, L. R. 5 Ch. D. 887. The case of *Hammersley* v. *De Biel* and other cases of ante-nuptial contracts are fully discussed in Davidson's Precedents of Conveyancing, vol. iii., part I., appendix, p. 635. See also Stephen, J.'s, review of the authorities in *Alderson* v. *Maddison*, L. R. 5 Ex. D. 293. The principles upon which representations of intention are enforced in equity, are explained in *Evans* v. *Bicknell*, 6 Ves. 174; *Burrowes* v. *Lock*, 10 Ves. 475; *Slim* v. *Croucher*, 1 De G. F. & J. 518, at p. 525; and per Bacon, V. C., in *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121, at p. 131.

(*y*) See *Warden* v. *Jones*, 23 Beav. 487; *Maunsell* v. *Hedges*, 4 H. L. Cas. 1039; *Dashwood* v. *Jermyn*, L. R. 12 Ch. D. 776; and *Alderson* v. *Maddison*, L. R. 7 Q. B. D. 174; and L. R. 8 App. Cas. 467; reversing Stephen, J., in L. R. 5 Ex. D. 293.

(*z*) *Ante*, p. 303.

(*a*) *Brett* v. *Clowser*, L. R. 5 C. P. D. 376.

for three years, and solicited the votes of creditors in the choice of assignees. He was held precluded, in an action for money had and received, brought by him against the assignees, from disputing the validity of the commission (*b*).

A. is sued by a wrong name, and suffers judgment to go against him without attempting to rectify the mistake. He cannot afterwards, in an action brought by him against the sheriff for false imprisonment, complain of an execution issued against him by that name (*c*).

G., the owner of certain fittings to a public house, demised them to D. D. thereupon became tenant of the public house to the landlord E., under an agreement which gave E. a lien on the fittings. G. was present at the execution of this agreement. Subsequently W., on being told by E. that D. was his tenant, bought the fittings from D. *bonâ fide* for value, in ignorance of G.'s title to them and without G.'s knowledge or assent. W. was then accepted by E. as tenant in the place of D. G. then brought an action of trover for the fittings against W. At the trial, Lord Denman, C.J., directed the jury, that if they were satisfied that the plaintiff had so allowed D. to deal with the fittings, as to hold him out to the world as the owner of them, and that the defendant had been thereby induced to purchase them *bonâ fide*, in the belief that they belonged to D., then the defendant was entitled to a verdict (*d*).

(*b*) *Like* v. *Howe & Rogers*, 6 Esp. 20.

(*c*) *Fisher* v. *Magnay*, 5 M. & G. 778; and cf. *Walley* v. *McConnell*, 13 Q. B. 903.

(*d*) *Gregg* v. *Wells*, 10 A. & E. 90. This direction was upheld in banc.

A., who is entitled to a legacy under a will, has a claim against the testator, which he conceals from the executor, until after he has received the legacy. A. afterwards sues the executor for the amount of the claim. A. is precluded from objecting that the amount of the legacy was not paid in a due course of administration (*e*).

W. H. died intestate in 1798, seised of a house and land, leaving a widow, and an only son by her, J. H., fifteen years old. The widow continued to reside on the property, and, about a year after the death of W. H., married defendant, and resided with him on the premises, J. H. also living with them until 1805, when he went away, occasionally returning for about a fortnight at a time until 1842. About that time defendant applied to plaintiff's lessor for a loan of £100 on mortgage of the property, and on that occasion, the title deeds being produced, the solicitor stated that it was necessary that J. H. being heir-at-law to W. H., should execute the conveyance. Defendant accordingly brought J. H., who executed the mortgage and signed the receipt for £100, which sum was received by defendant. Held, that defendant by his conduct had waived his right to set up the Statute of Limitations, so as to defeat the right of entry of J. H. and those claiming under him (*f*).

(*e*) *Stroud* v. *Stroud*, 7 M. & G. 417.

(*f*) *Doe* d. *Graves* v. *Graves*, 16 L. J. Q. B. 297; see also Sugden's Vendors and Purchasers (10th ed.), p. 248, cited in *Sandys* v. *Hodgson*, 10 A. & E. 476. But rights which are not merely private, *e.g.*, rights of presentation of a vicar of a parish, which are accompanied by spiritual and other duties in which the parishioners are interested, cannot be waived by the acquiescence of the individual possessing those rights. See *MacAllister* v. *Bishop*

A railway company permitted a carrier to hold himself out as their agent for the receipt of goods to be carried by them, and to represent his office as the receiving office of the company. The carrier omitted to require certain senders of goods to sign the usual conditions required by the company's regulations. Held, that this was an undue preference on the part of the company, and that they were liable to an injunction under the Railway and Canal Traffic Act (*g*).

A congregation of seceders, by a formal vote, united themselves to the Free Church of Scotland; and, in pursuance of that vote, a Free Church minister was solemnly inducted, without any objection or dissent on the part of a small minority of four persons, who had complete knowledge of all the proceedings. In an action brought by these four persons to have certain property, which had passed by the amalgamation, restored to them, held, that they were estopped by their own conduct from maintaining the action (*h*). Per Lord Campbell, (L.C.), at p. 829, "The doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he

of Rochester, L. R. 5 C. P. D. 194. See further as to the waiver of a right of forfeiture under a six months' notice to repair, by entertaining proposals of the lessee for sale of the property, after the notice had begun to run, *Hughes* v. *Metropolitan Ry. Co.*, L. R. 2 App. Cas. 439.

(*g*) 17 & 18 Vic. c. 31. See *In re Barendale*, 11 C. B. N. S. 787.

(*h*) *Cairncross* v. *Lorimer*, 3 Macq. 827.

thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." And again, at p. 830, "I agree with the Lord Justice Clerk and other judges, who thought that it is not necessary to prove concurrence, on the part of the Pursuers, in the proceedings now challenged, and that proof of positive assent or concurrence is not necessary. I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it had been done by his previous licence."

An insurance company having power to issue bonds and other securities, issued to S. a bond, conditioned to be void on payment to him, his executors, administrators, and assigns on a future day, of £250. The bond was assigned for value to B., and notice of the assignment given at the office of the company and accepted, but the assignment was never registered. No enquiry was made as to the validity of the instrument, before B. took the assignment. Before the bond fell due, the company went into liquidation. Held, on an application by B.'s executors to prove against the company, that the company had, by accepting notice of the assignment, precluded themselves from setting up against the

assignee, equities between them and the original obligor attaching to the instrument itself (*k*).

A so-called joint stock company was established in 1825, to work a mine, in which plaintiffs were partners. Certain calls were made on plaintiffs in respect of their shares, as to which there was a question whether they were validly made or not. Plaintiffs refused to pay the calls, whereupon distinct notice was given to them that their shares were forfeited. Plaintiffs took no steps to assert their interest for a period of nine years or upwards. Held, that they were precluded from setting up a claim to be partners (*l*).

Appellants and respondent entered into a written agreement to work certain mines, and to form a company for that purpose. The company was formed, and respondent took certain shares therein. Subsequently, respondent wrote to one of the appellants a letter containing the following passage: "If I cannot pay

(*k*) *In re Hercules Insurance Co., Brunton's Claim*, L. R. 19 Eq. 302; see also per Kay, J., in *In re Romford Canal Co.*, L. R. 24 Ch. D. 85, at p. 92, who says, "Such an equity cannot be set up against an equitable transferee, whether the security was transferable at law or not, if, by the original conduct of the company in issuing the security, or, by their subsequent dealings with the transferee, he has a superior equity." It would have been otherwise, however, if the assignment had been in fraud of the company, even though the assignment was made by officers of the company, and the fraud was confined to them, and the assignee was an innocent purchaser for value. In such a case the ordinary rule would apply, namely, that an assignee of a chose in action takes subject to the equities which affect the assignor. See *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & J. 294.

(*l*) *Prendergast* v. *Turton*, 1 Y. & C. Chanc. Cas. 98; see also *Norway* v. *Rowe*, 19 Ves. 144.

my calls, my shares will be adverted to in our next meeting, and, when notice has been given of the intention of the company, they will be forfeited unless the money be paid; this is the usual mode of proceeding, which I shall endeavour to avoid." Respondent afterwards, in other correspondence with appellants, repeatedly denied appellants' right to declare his shares forfeited. He however neglected to pay his calls, and subsequently appellants declared respondent's shares to be forfeited. Held, that respondent's shares were not forfeited, or his rights under the agreement affected, by his statements or conduct, and that he was not estopped from filing a bill in chancery for dissolution of the partnership, and for an account (*m*). Per Lord Wensleydale (at p. 670), after referring to *Norway* v. *Rowe* (*n*), and *Prendergast* v. *Turton* (*o*): "Now looking at the conduct of the respondent in this case, it appears to me perfectly clear, that it cannot be considered as amounting to an acquiescence of that sort. From the very first he disputed the right of the appellants to declare the forfeiture of the shares; he has been complaining of them from that day to this; and it is impossible to regard his conduct as amounting to an implied agreement, or an implied representation, that

(*m*) *Clarke* v. *Hart*, 6 H. L. Cas. 633, discussed and explained in *Rule* v. *Jewell*, L. R. 18 Ch. D. 560. And mere laches does not disentitle the holder of shares to equitable relief against an invalid declaration of forfeiture. See *Garden Gully United Quartz Mining Co.* v. *McLister*, L. R. 1 App. Cas. 39. But it might have that effect in the case of a voidable allotment of shares. See *In re Scottish Petroleum Co.*, L. R. 23 Ch. D. 413.

(*n*) 19 Ves. 144.

(*o*) 1 Y. & C. Ch. Cas. 98.

they might go on with the concern for their own benefit, and that he would not claim any share of the profits."

At a meeting of the partners in a cost-book mine, held in 1874, it was stated that the mine was £2,003 in debt, and a call of £25 was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrears for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, and in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still partners. Held, that even assuming the shares not to have been regularly forfeited, the plaintiffs, under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners (*p*). Per Kay, J. (at p. 665), citing from Lord Wensleydale's judgment in *Clarke* v. *Hart* (*q*), "Now it appears to me that the principle to be deduced from the cases of *Prendergast* v. *Turton* (*r*), and *Norway* v. *Rowe* (*s*) is, that, if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they may then deal with it as they please; if his conduct amounts to a representation of that sort he is estopped by it, and cannot afterwards complain."

A., before the registration of a company, applied for shares on the faith of a prospectus, and allowed more

(*p*) *Rule* v. *Jewell*, L. R. 18 Ch. D. 660.

(*q*) 6 H. L. Cas. at p. 670.

(*r*) 1 Y. & C. Ch. Cas. 98.

(*s*) 19 Ves. 144.

than a year to elapse, from the time when his shares were allotted to him, before raising the objection that the memorandum of association was not in accordance with the prospectus. Held, that his application to have his name taken off the list of contributories came too late (*t*).

a. The duty to speak or assert a right, must exist.—A., having a right to an estate, by his conduct induces B. to purchase it from another. A. will be precluded from afterwards setting up his right against B. (*u*).

Defendant was surety for the performance of an agreement between plaintiffs and N. Subsequently the agreement was varied by a release being executed, defendant not being a party, and in such a manner as to discharge the surety. The terms of the agreement not having been carried out, plaintiffs sued defendant on his guarantee, and it was sought to make him liable on the ground that, by his conduct in standing by, plaintiffs were led to believe that he assented to the alteration in the agreement, and therefore that defendant was estopped from setting up the alteration of the agreement by way of defence (*v*). Blackburn, J., however said (at

(*t*) *In re Barned's Banking Co., Peel's Case*, L. R. 2 Ch. App. 674; see also *Evans* v. *Smallcombe*, L. R. 3 H. L. 249. *A fortiori*, this would be the case if the application were made after the winding up of the company. See *Oakes* v. *Turquand*, L. R. 2 H. L. 325; *Tennent* v. *City of Glasgow Bank*, L. R. 4 App. Cas. 621; *In re Hull and County Bank, Burgess's Case*, L. R. 15 Ch. D. 507, at pp. 512, 513.

(*u*) See the rule laid down in Sugden's Vendors and Purchasers (10th ed.), p. 428, as stated in *Sandys* v. *Hodgson*, 10 A. & E. 176.

(*v*) *Polak* v. *Everett*, L. R. 1 Q. B. D. 669.

p. 673), "We must take it to be the fact, that, though defendant was well aware of this release being executed, he was not an assenting party to it. Then it is argued that knowledge on the part of the surety that there is going to be a release of a part of the security is enough, without assent. I cannot see any authority for that. . . . To say that a person who, being a surety, becomes aware that the creditor is going to give time or do something else, which, if done without his assent, may discharge him, is bound to warn the creditor against doing it, is a thing for which no authority whatever has been cited."

A.'s signature to a bill is forged. If A. is aware that a bank is relying upon his forged signature, he cannot lie by and not divulge the fact, until he sees that the position of the bank is altered for the worse. But his mere silence for a period subsequently to the time when he first knew of the forgery, during which period the position of the bank is in no way altered or prejudiced, will not be held to be an admission or adoption of liability, so as to estop A. from denying his liability on the bill (*y*).

β. Knowledge of the thing done must be brought home to the acquiescing party (*z*).—A. having a charge or incumbrance upon certain property, stands by and allows B. to advance money on it on the supposition that it is unincumbered. A. knows that B. is going to advance

(*y*) *McKenzie* v. *British Linen Co.*, L. R. 6 App. Cas. 82; see also *Davis* v. *Bank of England*, 2 Bing. 393. Judgment was reversed in error, but on technical grounds only.

(*z*) *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Johnson* v. *Credit Lyonnais Co.*, L. R. 3 C. P. D. 32, at p. 40.

the money, and suppresses the fact of his own interest. A. is estopped, as against B., from subsequently enforcing his charge (*a*).

A., an owner of land, stands by and allows B. to lay out money in building on his (A.'s) land, A. being all the time aware of his right to the land, and B. having no notice of it. A. is estopped from subsequently asserting his right, and will be compelled to permit B. to have quiet and peaceable enjoyment of the land so built on (*b*).

In an action for the recovery of land, defendant pleaded that he, several years ago, "by and with the knowledge, approbation, and consent of Plaintiff," built a wall for the purpose of making a boundary wall between plaintiff's land and his own, and that the portion claimed was included within the said boundary wall on his side. Held, on demurrer, that the plea should be construed as impliedly alleging that the plaintiff had represented to the defendant that the site of the wall was the boundary; and that such representation having been made with the intent of being acted upon, and the defendant having acted upon it by building the wall, the plea was a good defence by way of estoppel (*c*).

E. in 1870 was adjudicated a bankrupt, and was allowed by the trustee to carry on his business for the

(*a*) Per Jessel, M. R., in *Ex parte Ford, In re Caughey*, L. R. 1 Ch. D. 521, at p. 528.

(*b*) Per L. C. in *East India Co.* v. *Vincent*, 2 Atk. 82; and per Jessel, M. R., in *Ex parte Ford, In re Caughey*, L. R. 1 Ch. D. 521, at p. 528, citing *Troughton* v. *Gitley*, Amb. 630. See also Vin. Ab. Tit. Contract and Agreement, p. 523, pl. 10 (Mich. 5 G. Canc.), cited in *Jorden* v. *Money*, 5 H. L. Cas. 85; and *Cowell* v. *Watts*, 19 L. J. Ch. 455.

(*c*) *Sheridan* v. *Barrett*, 4 L. R. Ir. 223.

benefit of his creditors. In 1875 a creditor, whose debt had been contracted whilst, and who was ignorant of the circumstances under which, E. was so trading, obtained a judgment against him, under which the sheriff seized in execution furniture which E. had acquired by means of the profits of such trading. Upon an interpleader issue, it was held that the goods belonged in equity, and therefore at law, not to the trustee, but to the execution creditor (*d*).

The creditors of a trader who had filed a liquidation petition, resolved that he should have his discharge when they had received a sum amounting to two shillings in the pound on their debts. The estate realised only half that sum. The debtor went into business again, without obtaining his discharge, and contracted new debts, and afterwards filed a second liquidation petition. Held, that in the absence of positive evidence that the trustee or the creditors under the first petition were aware of the subsequent trading, they were entitled, in priority to the new creditors, to the assets acquired by the debtor in the course of his trading, to the extent necessary to make up the two shillings in the pound: for that it could not be assumed that the old creditors intended, when they passed their resolution, that the debtor should trade again in order to be able to pay the two shillings in the pound (*e*).

A bankrupt, who had never obtained his order of dis-

(*d*) *Engelbach* v. *Nixon*, L. R. 10 C. P. 645, following *Troughton* v. *Gitley*, Amb. 629; see also *Ex parte Bolland, In re Dysart*, L. R. 9 Ch. D. 312.

(*e*) *Ex parte Ford, In re Caughey*, L. R. 1 Ch. D. 521; see also *Meggy* v. *Imperial Discount Co.*, L. R. 3 Q. B. D. 711.

charge or passed his final examination, procured employment as editor of a weekly newspaper without the permission or knowledge of his trustee, and six years after the bankruptcy he was awarded, by the decree of a competent court, £104 as six months' salary in lieu of notice of dismissal. Held, that the bankrupt's trustee could claim this money before it was paid to him, as against any creditors subsequent to and without notice of the bankruptcy, and that the trustee had not been guilty of any breach of duty towards such creditors, so as to estop him from setting up his claim (*f*).

6. *Estoppel by Negligence.*—The rule as to estoppel by negligence is stated by Brett, L.J., in *Carr* v. *London and North Western Ry. Co.* (*g*) as follows: "If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first, to show that the state of facts referred to did not exist." Of this rule the following cases may be cited as illustrations :—

The trustees of a charity in Dublin, incorporated by Act of Parliament, and having a common seal, possessed stock in the public funds, which stock was registered in

(*f*) *Wadling* v. *Oliphant*, L. R. 1 Q. B. D. 145.

(*g*) L. R. 10 C. P. 307; see also the same learned judge's remarks in *Cheetham* v. *G. E. Ry. Co.*, L. R. 11 Q. B. D. 776, at p. 780; *Gregg* v. *Wells*, 10 A. & E. 97; and *Freeman* v. *Cooke*, 2 Ex. 654.

their names in the Bank of Ireland. G., the secretary of the incorporated trustees, was allowed to have their seal in his possession. Five several powers of attorney to receive the stock, purporting to have been prepared in different years, and to have been sealed with the seal of the incorporated trustees, were presented to the bank by A. and the stock was transferred to him. The due affixing of the seal was attested by witnesses, without any fraudulent intention on their part. The seal had, however, in reality been affixed by G. alone, without any authority from the trustees. The facts were afterwards discovered, and G. was tried and convicted of forgery. By a power of attorney duly executed, the trustees then authorised C. to take a transfer of the stock, but the bank refused to make the transfer. In an action brought by the trustees against the bank for so refusing, the judge directed the jury that if, under the circumstances, the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given for the defendants: but, on exceptions to this direction, it was held to be wrong (*h*). Per Parke, B. (at p. 411), "It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney." And again (at pp. 409, 410), "We concur with Mr. Justice Jackson and Justices Ball, Crompton, and Torrens, and the Chief Justice Lefroy, in thinking that the negligence which would deprive the plaintiffs of

(*h*) *Bank of Ireland* v. *Trustees of Evans's Charities*, 5 H. L. Cas. 389, 413.

their right to insist that the transfer was invalid, must be negligence in, or immediately connected with, the transfer itself" (*i*).

T. was the holder of certain shares in a company upon which £20 each had been paid, which may be called the £20 shares. T. was also entitled to certain other shares in the same company, upon which £2 each had been paid up, which may be called the £2 shares. T. instructed his broker to sell the £2 shares. The broker then brought to T., for execution by him, deeds of transfer in which blanks were left for the name of the transferee, for the number of shares sold, and for the distinctive numbers of the shares. The deeds bore stamps high enough to cover the £20 shares, and were executed in blank by T. The deeds were delivered in this condition by the broker to *bonâ fide* purchasers for value, together with the share certificates for the £20 shares, which had been fraudulently obtained by the broker for the purpose. The purchasers afterwards filled up the blanks in the deeds of transfer, in accordance with the certificates for the £20 shares. Before the registration of the purchasers as holders of the shares was complete, T. filed a bill against the company and the purchasers, claiming to have the shares given up to him, and his name restored to the register. Held, by the Lords Justices, affirming the decision of V.-C. Wood, that the plaintiff was entitled to

(*i*) This case was doubted in *Coles* v. *Bank of England*, 10 A. & E. 437, which latter case was, however, disregarded in *Swan* v. *North British Australasian Co.*, 2 H. & C. 175, and in *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. 525, at p. 534.

the relief he asked for (*k*). The Court however considered that plaintiff's negligence had been so great that they refused to give him his costs of the appeal. The decree of V.-C. Wood in the Court below (*l*) was, "It must be declared that the several deeds of transfer are void, and that the plaintiff is entitled to the shares expressed to be transferred thereby, and to have his name restored to the register. He trusted the broker to the extent of the sixty £2 shares, and he must give up the money received in respect of them: and, upon his submitting to that, he will have his costs of the suit."

Plaintiff was the registered owner of 1000 shares in a joint stock company, registered under the Companies Act, 1856, in which the shares could only be transferred by deed, executed by both transferor and transferee, and which may be called the A. shares. Plaintiff was also the owner of some shares in another company, which were also transferable by deed only, and which may be called the B. shares. Plaintiff employed a broker to sell the B. shares for him. The broker represented to plaintiff that it was necessary for him to execute ten blank forms of transfer. Plaintiff accordingly signed, sealed, and delivered to the broker ten blank forms of transfer, for the transfer of the B. shares. The broker only used eight of the blank forms for that purpose, and, having stolen the certificates for the A. shares from a box deposited at a bank for safe custody, he feloniously filled up the two remaining forms as transfers of 500 each of the A. shares;

(*k*) *Taylor* v. *Great Indian Peninsular Ry. Co.*, 28 L. J. Ch. 285; 28 L. J. Ch. 710.

(*l*) 28 L. J. Ch. 285.

and then, having forged the attestations, he delivered the transfers, together with the certificates for the A. shares, to *bonâ fide* purchasers for value. The company, on the purchasers presenting to them these transfers and certificates, removed plaintiff's name from the register of shareholders, and placed thereon the names of the purchasers. The fraud was afterwards discovered, and the broker was tried and convicted of theft and forgery. Plaintiff then made an application by motion, to the Court of Common Pleas (*m*), to have his name replaced on the register of shareholders as the owner of the A. shares, and that the register might be rectified accordingly. The judges being equally divided in opinion, Williams and Willes, J.J., in favour of plaintiff, and Erle, C. J., and Keating, J., against him, the application fell through (*n*). Plaintiff then commenced an action against the company in the Court of Exchequer, claiming (1) damages for the non-performance by defendants of their duty to replace plaintiff's name on the register of shareholders, and (2) a mandamus to compel defendants to replace his name on the register. This court was also equally divided in opinion, Martin and Channel, B. B., in favour of plaintiff, on the ground that the transfers of the shares were void (*o*) *ab initio*, and that plaintiff was not estopped, by his negligence, from insisting that the property in the

(*m*) Under 19 & 20 Vic. c. 47, s. 25, and 20 & 21 Vic. c. 14, ss. 8, 9.

(*n*) In the matter of the *North British Australasian Co.* (*Lim.*), and The Joint Stock Companies Acts, 1856 and 1857. *Ex parte Robert Swan*, 7 C. B. N. S. 400.

(*o*) Transfers of shares in blank, however, though void at law, give in equity a right to call for a legal transfer. See *Morris* v. *Cannan*, 4 De G. F. & J. 581.

shares did not pass under the transfers, and Pollock, C. B., and Wilde, B., in favour of defendants (*p*). The case then came before the Exchequer Chamber in error, when there was a large majority of judges in favour of plaintiff on the ground above stated, namely, Cockburn, C. J., Crompton, Willes, Byles, and Blackburn, J. J., *dissentiente* Keating, J., who adhered to his previous opinion (*q*). It was held however (1) *per totam curiam*, both in the Court of Exchequer and in the Exchequer Chamber, that negligence, to operate as an estoppel, must be the proximate cause of loss, and (2) by the majority of the judges, that the doctrine of estoppel by executing instruments in blank, is confined to negotiable instruments and does not apply to deeds. The following extracts are given from the judgment in this case. Per Williams, J., in the Court of Common Pleas (*r*): "It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might well foresee and dread, and would therefore shun. But it is another and very different proposition to maintain, that a man shall forfeit his property, because he has done an act which will not be perilous unless others are also guilty of misconduct which that act does not cause. In my opinion such an act ought not to disentitle the applicant, even supposing the doctrine established, that he would be disentitled, if the filling up of the blank transfer

And see as to transfers of shares under the Companies Acts, Buckley on the Companies Acts (4th ed.), p. 408 *et seq.*

(*p*) *Swan* v. *North British Australasian Co.* (*Lim.*), 7 H. & N. 603.

(*q*) *Swan* v. *North British Australasian Co.* (*Lim.*), 2 H. & C. 175.

(*r*) 7 C. B. N. S. 400.

had *per se* enabled the broker to commit the fraud. I think that the title to the shares has all along remained in the applicant." Per Martin, B., in the Court of Exchequer (*s*), "In the present case the alleged negligence of the plaintiff was separated from the execution of the alleged transfer by three felonious acts of the broker, viz.; first, his theft of the certificates: secondly, his fraudulently filling in the numbers into the blanks: thirdly, his fraudulently transferring the shares to purchasers: all of them in fraud of the plaintiff." Per Mellor, J., in the Exchequer Chamber (*t*), "The false representation is the representation of the broker, not of the plaintiff, and the proximate cause which induced the company to alter their position to their prejudice was the fraudulent and felonious conduct of the broker, and not the negligence of the plaintiff." Per Blackburn, J. (*ibid.*), "Now I agree that a party may be precluded from denying against another the existence of a particular state of things, but then I think it must be by conduct on the part of that party such as to come within the limits so carefully laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Freeman* v. *Cooke* (*u*). It is pointed out by Parke, B., in the course of the argument in that case, that, in the majority of cases in which an estoppel exists, 'the party must have induced the other so to alter his position that the former would be responsible to him in an action for it,' and he had before pointed out that negligence, to have the effect of estopping the party, must be 'neglect of some duty cast upon the person who is guilty

(*s*) 7 H. & N. 603. (*t*) 2 H. & C. 175. (*u*) 2 Ex. 654.

of it.' And this, I apprehend, is a true and sound principle. A person, who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, unless it be in market overt." . . "What I consider the fallacy of my brother Wilde's judgment is this: he lays down the rule in general terms, 'that if one has led others into the belief of a certain state of facts, by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist.' This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake: and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy: and these distinctions make in the present case all the difference . . . A party signing in blank a cheque or bill, or other negotiable instrument, does intend that it shall be filled up and delivered to a series of holders, and therefore he stands to all those holders in the position indicated in the first branch of the judgment of *Freeman*

v. *Cooke*. He means the holder to be induced to take the instrument, as if it had been filled up from the first. And that makes a marked distinction between that case and the present, in which the plaintiff never did mean that anyone should take this transfer of the shares as genuine" (*x*).

The opinions of the minority of the judges in the above case are ably represented by the judgment of Keating, J., in the Exchequer Chamber (*y*), as follows—"I am of opinion that the judgment should be reversed, upon the ground that the plaintiff has, by his culpably negligent act, enabled his agent to commit a fraud to the prejudice of third persons by fabricating a transfer to them of the shares in question, and has so estopped himself from asserting, as against such third persons, that the transfer did not operate. Here the plaintiff delivered to his agent blank transfers, signed and sealed, to be filled up by him with the names of the shares and transferees, and even with the names of attesting witnesses, with the intent that he should thereby obtain money from third persons, for shares which he must be taken to have known his agent could not thus legally transfer, but could only make a fraudulent semblance of doing so, and when the agent has, by means of such transfers, obtained money from innocent third parties, the question is whether he (the plaintiff) can be heard to say, as against

(*x*) See also the judgment of Cockburn, C. J. (*ibid.*), who said that he was of opinion that negligence alone, although it might have afforded an opportunity for the perpetration of a forgery by means of which another party had been dammified, was not of itself a ground of estoppel.

(*y*) 2 H. & C. 175.

such third parties, that his agent filled up the names of the shares as Australasian, whereas he had directed him to fill them up as Australian shares. I think not, upon any principle that would not equally apply to a blank acceptance fraudulently filled up, but in the hands of a *bonâ fide* holder. It was argued in the Court below, that forgery and robbery were not the necessary or ordinary result of the act of delivering the blank transfers, but neither is it in the case of blank acceptances fraudulently filled up, nor was it in the case of *Young* v. *Grote* (*z*). I am aware that it has been said, that the principles which are in such cases applicable to negotiable instruments do not apply in other cases, but I have been unable to find any case decided upon any such distinction. Had such existed, it would have furnished a short answer in the case of *The Bank of Ireland* v. *Evans's Trustees* (*a*); but it does not seem to have been given to that case, nor to have been adverted to when the case of *Young* v. *Grote* (*b*) was cited in argument, and commented upon in the judgments. It is true that the plaintiff could not have anticipated the stealing of the certificates, but the title to the shares is conveyed by the deed of transfer, the certificates being merely, I apprehend, a machinery, established for the convenience of the company in conducting their business, and I do not think the responsibility of the plaintiff, in respect of the transfer made by his agent, is affected or done away with, because the transfer was completed by the felony of the broker. No doubt the plaintiff, as far as it appears,

(*z*) 4 Bing. 253.
(*a*) 5 H. L. Cas. 389, 413.
(*b*) 4 Bing. 253.

supposed the broker to be an honest man, and was mistaken, a circumstance which must always occur in every case where a question like the present is or can be raised. But the acts which, in *Young* v. *Grote*, and in *Tayler* v. *Great Indian Peninsular Railway* (*c*), were said to be acts of culpable negligence, appear to me less in degree than the acts of negligence attributed to the plaintiff in the present case, and which directly and proximately enabled the broker to effect the transfers, which he made complete by his felony in stealing the certificates. I think therefore that the rule in the well-known case of *Lickbarrow* v. *Mason* (*d*) applies."

Plaintiff, the owner of railway shares in two companies, took certificates from the companies, for which he gave receipts. In so doing he gave his address, in one instance at the office of a banking company, in the other at a club. He deposited the certificates with the manager of the bank for safe custody. The manager fraudulently sold the shares, and forged plaintiff's name to transfer deeds of the shares. The companies wrote to plaintiff, informing him of the transfers, and receiving, in one instance no answer, and in the other an answer purporting to come from plaintiff but in reality forged by the manager,

(*c*) 28 L. J. Ch. 285 ; 28 L. J. Ch. 710.

(*d*) 2 T. R. 63. For an instance of a case of a transfer of shares in fraud of the holder, in which the company was guilty of negligence, and, therefore, liable to the real holder of the shares, see *Ashby* v. *Blackwell & Million Bank Co.*, 1 Amb. 503. And, for an instance of a case of a similar transfer, by means of a forged letter of attorney, in which there was no negligence on the part of the company, and the purchaser was held liable, see *Hildyard* v. *South Sea Co. & Keate*, 2 P. Wms. 75.

registered the transfers. Decreed, on bill by plaintiff against one of the companies and the purchaser, that the purchaser must deliver up the certificates to plaintiff, that the company must cancel the alleged transfer, and the entry of it in their books, and must deliver to plaintiff a stock certificate, and pay to him the dividend then due, and all future dividends, but that the negligence or mistaken conduct on plaintiff's part disentitled him to costs against either defendant (*e*).

A person in the service of the clerk to the guardians of the poor, who was employed to fill up the orders for signature by them, drew a number of orders in such a way that the amounts for which they were drawn could be increased by the insertion of words and figures in the blank spaces; and, after signature of the orders, he increased the amounts accordingly. Plaintiffs, the guardians, sued defendant, the salaried manager of a bank, who was appointed treasurer to the guardians, for the amount of the orders so paid. On a case stated by an arbitrator, it was found as a fact, that the payment of the excess was due solely to the fact that the treasurer's clerks were misled by want of proper caution on the part of the plaintiffs and their clerk, in signing the orders fraudulently prepared for their signature. Held, that the negligent drawing of the orders disentitled plaintiffs to complain of the payment of the excess (*f*).

(*e*) *Johnston* v. *Renton*, *Johnston* v. *Parcey*, L. R. 9 Eq. 181; following *Cottam* v. *Eastern Counties Ry. Co.*, 1 J. & H. 243. Cf. *Coates* v. *L. & S. W. Ry. Co.*, 41 L. T. 553, where there was no negligence on part of plaintiff.

(*f*) *Halifax Union* v. *Wheelwright*, L. R. 10 Ex. 183.

To an action for the loss of pictures delivered by plaintiff to be carried by defendants, a railway company, defendants pleaded the Carriers Act (1 Wm. 4, c. 68), and plaintiff replied that the loss arose from the felonious acts of defendants' servants. The pictures were loaded in a van in defendants' yard, ready to be sent to their destination, when a man represented himself to be C., a driver in the employ of M., who carried for defendants, and defendants' delivery clerk gave the man a pass which enabled him to drive the van out of the yard, and so to steal the pictures. There was a man named C. in M.'s employ, but he was not the guilty person. Held, that defendants were not estopped from denying that the thief was their servant (*g*). Per Blackburn, J., (at p. 695), "There may have been negligence, perhaps gross negligence, but that is all."

Plaintiffs, merchants at New York, desiring to transmit £1,000 to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount, payable to the order of plaintiffs on demand. Plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them, which was placed in a letter-box in their office, to be posted in the usual way. The letter was stolen by one H., a clerk in the employ of plaintiffs, who forged an indorsement of W. & Co., and procured defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with H., upon whose cheques the money was almost imme-

(*g*) *Wag v. G. E. Ry. Co.*, L. R. 1 Q. B. D. 692.

diately drawn out. In an action for money had and received against defendants, they, in order to show that the negligence of plaintiffs in the custody and transmission of the draft, afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and almost invariable practice amongst merchants sending large remittances from abroad, to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action. Held, that plaintiffs' right to the draft, and to sue for the proceeds thereof in the hands of defendants as money received to their use, was not affected by the felonious act of H., and that the evidence tendered was properly rejected, as it was evidence of matters which were entirely collateral to the transmission of the draft, and that it was no part of the duty of plaintiffs, either to W. & Co. or to the general public, to have sent the letter of advice (*h*). Per Lord Coleridge, C. J. (at pp. 589, 590), "If it were the duty of the plaintiffs to guard against larceny and forgery in that way, it is impossible to say where, as observed by Parke, B., in *Bank of Ireland* v. *Evans's Charities* (*i*), on that principle, it is to stop. The post-office is a recognized means of transmitting letters with their contents (not being actual money), in the regularity of which full confidence may be placed. But, if there be such a duty

(*h*) *Arnold* v. *Cheque Bank*, L. R. 1 C. P. D. 578. *Same* v. *City Bank*, L. R. 1 C. P. D. 578. Cf. *Dickson* v. *Reuter's Tel. Co.*, L. R. 3 C. P. D. 1.

(*i*) 5 H. L. Cas. 389.

in this case, the breach of which would amount to a neglect of proper precaution, and disentitle the plaintiff to sue, it would equally be negligent on the part of every sender of a cheque for a large amount, not to send a separate letter of advice with it, which would entail upon the senders of cheques new and unheard of responsibilities. Besides, this duty would be collateral to the indorsing and forwarding of the draft, and the omission of it could in no sense be considered as the proximate cause of the larceny and forgery which have occurred: and no authority has been cited to us to the effect that any such failure of a precaution merely collateral, could in any way affect the title of a plaintiff to sue."

Scrip certificates, by which it was certified that, after payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking company, were issued to plaintiff, and by him deposited with a stock-broker for the purpose of paying the instalments remaining due, and dealing with such certificates as plaintiff should direct. The broker in fraud of plaintiff, and without his authority, deposited the scrip with defendants as security for an amount due from him, the broker, to defendants. Defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money dealers, and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery. Held, that defendants were entitled to the scrip certificates as against plaintiff, first, on the ground that by reason of the usage the certificates had become negotiable instruments transferable by mere

delivery, and secondly, on the ground that plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a *bonâ fide* holder for value, was estopped from denying that they were so transferable, and from recovering them from defendants (*k*).

Defendant gave H. his blank acceptance on a stamped paper, and authorised H. to fill in his name as drawer. H. returned the blank acceptance to defendant in the same state in which he received it. Defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without defendant's authority, and an action was brought on it by plaintiff as indorsee for value. Held, that defendant was not liable on bill (*l*); per Bramwell, L. J., on the ground that there was no estoppel between the parties, which prevented defendant from setting up the true facts, as, if defendant had been guilty of negligence, it was not the proximate or effective cause of the fraud.

A son, heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved it, and whose Christian names and description were identical with those of his father, executed mortgages of freehold and leasehold property of the father, and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his

(*k*) *Rumball* v. *Metropolitan Bank*, L. R. 2 Q. B. D. 194, following *Goodwin* v. *Roberts*, L. R. 10 Ex. 337; L. R. 1 App. Cas. 476.

(*l*) *Baxendale* v. *Bennett*, L. R. 3 Q. B. D. 525.

mother and sister, who were co-trustees and co-executrixes with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situated in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor, who acted for both parties, believed the son to be the absolute owner. The solicitor searched the Middlesex registry, but the son told him nothing about his father's will. The son took a beneficial interest under the will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title deeds. Held, by Kay, J., and the Court of Appeal, that the son in executing the deeds was personating his father: that the deeds were forgeries, and passed nothing to the mortgagees, except the son's beneficial interest under his father's will, and that the mortgagees must deliver up the title deeds to plaintiffs (*m*). Per Lindley, L. J. (at p. 634), "It is said, and with some truth, that the plaintiffs were guilty of negligence in not registering the will, and no doubt in one sense it is the non-registration of the will which has led to this unfortunate fraud. But are they in point of law responsible for that? It appears to me that they are not, and this conclusion is amply covered by authority. The fraud, and the loss to the mortgagees, is not sufficiently the proximate result of the plaintiffs' negligence to make them in

(*m*) *In re Cooper, Cooper* v. *Vesey*, L. R. 20 Ch. D. 611.

law responsible for it. A crime intervened, the forgery; and, although they were negligent in not registering the will, that negligence was not the proximate cause of the forgery, and still less the proximate cause of the fraud which was the result of the forgery."

Defendants received a consignment of wheat, and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from plaintiffs. Shortly afterwards defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B., having afterwards become insolvent, held, that defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate plaintiffs for the loss sustained by them through the advances to B. (*n*).

7. *The representation must have been acted upon by the party setting up the estoppel, and to his prejudice.*—A. brings an action of trover for the recovery of property, against B. and C., and recovers judgment against B. C., in consequence of the judgment, authorises the property to be delivered up to A., but at the same time gives notice to A. of his intention to reclaim the property from

(*n*) *Coventry* v. *G. E. Ry. Co.*, L. R. 11 Q. B. D. 776. Cf. *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307, *ante*, pp. 333—335.

him. C. then brings an action against A. to recover the property. Held, that C. is not precluded from bringing the action by having authorized the property to be delivered up to A. (*o*).

A. having applied to defendant for the causes of his detention, he received a written statement that "annexed to the sheriff's return is a warrant of the judge of the County Court of Yorkshire, of which the following is a copy." As a fact, a copy only of the warrant was attached to the return. The jury found that defendant never had the original warrant, but that he had acted as if he had it, and had led A. to believe that he had it. Held, that as there was no wilful intent on the part of defendant that A. should act on the representation, and as A. was not in any way prejudiced by it, defendant was not estopped from giving the truth in evidence (*p*).

A. sheriff's officer produces to A. a warrant for the arrest of B. A. then represents herself to be B., and the officer, in consequence, arrests her. A. then denies her first statement, and says that she is not B., but the officer nevertheless detains her in custody. A. is not estopped by her conduct from bringing an action against him for detaining her in custody after he had notice that she was not the real party, though she might be estopped from denying that she had been properly arrested in the first instance (*q*).

A. makes a representation to B., which is partly acted

(*o*) *Sandys* v. *Hodgson*, 10 A. & E. 472.

(*p*) *Howard* v. *Hudson*, 2 E. B. 1.

(*q*) *Dunston* v. *Paterson*, 2 C. B. N. S. 495.

upon by B., and partly not. There is nothing to prevent A. from afterwards saying to B., "I was mistaken in the representation I made to you, and, so far as you have not yet acted on the faith of it, I retract it, and require you to act as if the representation had never been made (*r*)."

A. and B. are parties to a fraudulent transaction which is only partly carried out. B. and C. act upon it and derive benefit therefrom (*i.e.*, by obtaining, B. the possession of, and C. the property in, certain goods of A)., C. having notice of the fraud. In an action by A. against B. and C. to recover the goods, A. is not estopped from repudiating the transaction (*s*).

An execution creditor was, at the time when his debt was contracted, aware that his debtor had given a bill of sale of chattels. Held, that he is not estopped, as against the bill of sale holder, from subsequently availing himself of the objection that the bill of sale had not been registered (*t*).

C. owned stock in a company incorporated under the Companies Act, 1862. His clerk, P., contracted to sell stock in the company to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the company for registration. The company sent a letter to C. in-

(*r*) See per Williams, J., in *White* v. *Greenish*, 11 C. B. N. S. at p. 232. The same rule is applicable to admissions. See *Heane* v. *Rogers*, 9 B. & C. 586; and *Newton* v. *Liddiard*, 12 Q. B. 927.

(*s*) *Taylor* v. *Bowers*, L. R. 1 Q. B. D. 291, and *ante*, p. 202, following *Bowes* v. *Foster*, 27 L. J. Ex. 262.

(*t*) *Edwards* v. *Edwards*, L. R. 2 Ch. D. 291.

quiring whether the transfer was valid and, receiving no answer from him, they registered the transfer. B. borrowed money from a bank, and, as security for the loan, the stock was transferred by S., at the request of B., to I. as trustee for the bank, and the company registered I. as owner, and issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, and the stock was held by I. as bare trustee for B. The forgery was discovered, and the company then refused to acknowledge I. as the holder of the stock. In an action brought by B. and I. to compel the company to recognize their title, it was held by the Court of Appeal, reversing the judgment of Lindley, J., that although I., as trustee for the bank, might have acquired (*u*) a good title by estoppel against the company, yet that title ceased when the loan by the bank was paid off, and that no estoppel existed in favour of B. against the company, on the following ground (*inter alia*), namely, that no representation sufficient to raise an estoppel was made by the company to B. (*x*). Per Brett, L. J. (at pp. 209, 210), "The issue of the certificate would have amounted to such a representation, if it had been acted upon by the party to whom it was made. But at the time B. bought the stock on the Stock Exchange, he did not rely upon anything said or done by the company; he trusted wholly to the broker through whom he purchased and relied wholly upon him; he paid the price to him upon the faith of a trans-

(*u*) And in fact did acquire. See per Brett, L. J., in L. R. 5 Q. B. D. at p. 206.

(*x*) *Simm* v. *Anglo-American Telegraph Co.*, L. R. 5 Q. B. D. 188.

fer which was alleged to have been obtained from C., and not upon the faith of anything done by the company."

In January, 1878, B. was a customer of and a shareholder in the defendant bank, and was also secretary of a club having an account there. B. fraudulently altered a cheque for £600, drawn by the club in favour of S. or order, by striking out the word "order" and adding the word "bearer," and then induced the bank to place the £600 to the credit of his own account. In November, 1878, plaintiff lent B. £1000 upon the security of the deposit of a share certificate for fifty shares in the bank. The certificate gave the holder thereof notice that the bank had a paramount lien on the shares of any shareholder for whatever might be due from him to the bank. On the 17th of March, 1880, plaintiff gave notice to the bank of the deposit of the certificate, and was told by the bank manager, in answer to his enquiry, that the bank had no claim on the shares. In May, 1880, the bank received notice of B.'s fraud. They then settled with the club, debited B.'s account with the £600, which they had paid to him on the irregular cheque, and gave plaintiff notice that they claimed a lien on the shares for that amount. In an action by plaintiff, claiming a declaration that the shares were subject to his equitable mortgage, held, that as plaintiff was in no way prejudiced by the statement made by the bank manager on the 17th of March, 1880, the bank were not estopped from setting up their lien on the shares, and that the action must be dismissed (*y*).

(*y*) *Horsfall* v. *Halifax & Huddersfield Union Banking Co.*, 52 L. J. Ch. 599.

a. *The benefit of the estoppel can only be claimed to the extent of the damage caused by the representation.*— Plaintiff buys goods, which are to be consigned to him by a railway company. Plaintiff receives from the company an advice note, informing him that two parcels of goods had been received by them for his account, and that they hold them subject to the payment of rent and charges. One of the parcels, through a mistake of the company, being wrongly described in the advice note, a "corrected" advice note is sent to plaintiff, rectifying the mistake. Plaintiff thinks that the "corrected" advice note refers to a third parcel of goods, and instructs his broker to sell three parcels. Plaintiff receives invoices of three parcels from the consignors, and pays for the whole. The three parcels are sold, and plaintiff pays the rent and charges on them all. It turns out (the mistake not being made known to all parties until after the sale of the three parcels), that only two parcels had been delivered to the company, and plaintiff has to pay the purchasers the difference between the price at which they had bought the third parcel, and what they had to pay for other goods. Plaintiff then brings an action against the company for not delivering the third parcel. Held, that neither the payment by plaintiff of the warehouse rent and charges, nor of the invoice price, could be relied upon by him as damage resulting from the conduct of defendants, in order to estop defendants from denying the possession of the goods; for that either damage could be rectified without the intervention of such an estoppel, both payments having been

made under a mistake of fact; and that any damage which he suffered was by reason of the resale (*z*).

Where a partnership debt has been incurred by means of a fraud on the part of the partners, the defrauded creditor has a right to prove, at his election, against either the joint estate of the firm or the separate estates of the partners, even though no judgment has been recovered by him against the partners. Held, that when a creditor has such a right of election, he does not lose it merely because he has proved and received dividend; but that he may change his election on refunding the dividend which he has received, with interest at 4 per cent., though he cannot disturb any dividend already paid (*a*). Per James, L. J. (at p. 817), "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do" (*a a*).

B. & Co. were creditors of a partnership for £2,400, for which they held a security comprising joint property of the firm, and also separate property of one of the partners. The firm being in difficulties, the joint creditors agreed to accept a composition, and B. & Co. valued

(*z*) *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307; cf. *Coventry* v. *G. E. Ry. Co.*, L. R. 11 Q. B. D. 776.

(*a*) *Ex parte Adamson, In re Collie*, L. R. 8 Ch. D. 807. Cf. *Latter* v. *White*, L. R. 5 H. L. 578 (per Lord Cairns).

(*aa*) See also *Goddard* v. *Smith*, L. R. 3 P. & D. 7.

their security at £800, and proved and received the composition upon the balance. Subsequently they received from their security more than £800 and interest from the date of valuation. Four years after the close of the composition the debtors brought an action to redeem their security. B. & Co. claimed to retain the security on the separate property until they had received payment in full of their claim, on the ground that they need not have deducted the separate property. Held, affirming Jessel, M. R., that inasmuch as the composition had been fixed, and the whole proceeding in the composition had been taken and completed upon the footing of the valuation of the compound security at £800, leave to amend the proof could not now be given, whatever might have been the case had a proper application for that purpose been made during the pendency of the composition proceedings (*b*).

A firm of two partners dissolved, one retired and the other carried on the business with a new partner under the same style. A customer of the old firm sold and delivered goods to the new firm, after the change of partners, but without notice of it. After receiving notice, he sued the new firm for the price of goods, and upon their bankruptcy proved against their estate (*c*), and afterwards brought an acion against the late partner.

(*b*) *Couldery* v. *Bartrum*, L. R. 19 Ch. D. 394.

(*c*) He also carried on correspondence with them, and received a cheque from them; but, as to the former of these, Lord Selborne, in his judgment (L. R. 7 App. Cas. at p. 353), considers that it might have been entirely consistent with his reserving his right to elect, and, as to the latter, he observes that taking it would not have been a conclusive election.

Held, reversing the decision of the Court of Appeal, that, the liability of the late partner was a liability by estoppel only, and not jointly with the members of the new firm; that the customer might, at his option, have sued the late partner, or the members of the new firm, but could not sue all three together; and that, having elected to sue the new firm, he could not afterwards sue the late partner (*d*).

8. *A representation does not operate as an estoppel, if the party making it is legally incapacitated from entering into the obligation from which the estoppel might otherwise have arisen.*

Infants and Married Women.—With certain statutory exceptions, a representation does not bind the party making it, by way of estoppel, if such party was, at the time of making the representation, an infant or a married woman.

A married woman made a representation, by signing a note "J. B. widow," that she was discovert, which was acted upon. Held, that she was not estopped by it. Per Parke, B., "The law throws protection round infants and married women, and you cannot make them liable to contract, by their own representation (*e*)."

(*d*) *Scarf* v. *Jardine*, L. R. 7 App. Cas. 345. As to what amounts to an election, see *Fell* v. *Parkin*, 47 L. T. N. S. 350; and see also *Ex parte Harper, In re Bremner*, L. R. 10 Ch. App. 379.

(*e*) *Cannam* v. *Farmer*, 3 Ex. 698; see also *Smith* v. *Marsack*, 18 L. J. C. P. 65, where the indorsement of a married woman was held not to transfer the property in a bill payable to her order; *Coward* v. *Hughes*, 1 K. & J. 443; *Liverpool Adelphi Loan Association* v. *Fairhurst and Wife*, 9 Ex. 422; *White* v. *Greenish*, 11 C. B. N. S. 209; *Wright* v. *Leonard*, 11 C. B. N. S. 258.

Declaration for goods sold. Plea, infancy. Replication, on equitable grounds, that defendant, at the time of accruing of the causes of action, with knowledge of his true age, falsely and fraudulently represented to plaintiff that he (defendant) was of full age, whereby plaintiff was induced to enter into the contract to supply the goods. Replication held bad on demurrer (*f*). Per Crompton, J., "It is clear, on the authorities, both as to coverture and infancy, which stand on the same footing, that, whenever a tort is connected with a contract made with a married woman or an infant, it does not prevent them from pleading their incapacity to contract."

If, however, an infant borrows money upon a fraudulent misrepresentation that he is of full age, and subsequently becomes bankrupt, the debt is provable in his bankruptcy (*g*).

And a fraudulent misrepresentation made by a married woman on the faith of which another has acted, has been held in equity to bind her property. Thus where a married woman, two months after her marriage, wrote and signed in her maiden name a paper dated before the marriage, and purporting to give to her husband, in consideration of the marriage, her reversionary interest in a trust fund, for the purpose of enabling her husband to borrow money thereon; and her husband then sold the reversionary interest, and shortly before completion she gave to the purchaser's solicitor a letter, addressed

(*f*) *Bartlett* v. *Wells*, 31 L. J. Q. B. 57; see also *Johnson* v. *Pie*, 1 Keb. 913; *Miller* v. *Blankley*, 38 L. T. N. S. 527.

(*g*) Per Lindley, J., in *Miller* v. *Blankley*, 38 L. T. N. S. 527, at p. 530, citing *Ex parte Unity Bank, Re King*, 27 L. J. Bank. 33.

to one of the trustees of the fund, stating that she had, before her marriage, assigned her interest in the trust fund to her husband; on the determination of the life interest, it was held on appeal (reversing the M.R.), that she had been guilty of a fraud which precluded her from claiming her equity to a settlement against the purchaser (*h*).

But where property is settled on a married woman to her separate use, with a restraint on anticipation, she cannot defeat the clause in restraint of anticipation by making a mortgage of the property, and concealing the restraint on anticipation from the mortgagee; and the mortgagee in such a case cannot obtain a charging order on her next accruing dividend (*i*).

Incorporated bodies.—The principles of estoppel in pais are applicable to corporations just as much as to individuals (*k*). But a statutory incapacity, on the part of incorporated bodies, to contract, may be said to exist in cases where the contract appears to be necessarily unconnected with the purposes of the incorporation (*l*); and the acts and conduct of such bodies, or of those who represent them, are limited and controlled by the charter or Act of Parliament which incorporates them, and if *ultra vires*, the powers given to them, are altogether void.

(*h*) *In re Lush's Trusts*, L. R. 4 Ch. App. 591; see also *Sharpe* v. *Foy*, *ibid.* 35.

(*i*) *Stanley* v. *Stanley*, L. R. 7 Ch. D. 589.

(*k*) Per Lord St. Leonards in *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. Cas. at p. 376.

(*l*) *Mayor of Norwich* v. *Norfolk Ry. Co.*, 4 E. & B. 413; *Attorney-General* v. *G. N. Ry. Co.* 1 D. & S. 154.

Thus an incorporated company having gain for its object, is liable in respect of contracts not under seal, provided they are necessary for, and incidental to, the purposes for which the company was created (*m*). But where there were obligatory sections in the Public Health Acts (*n*), that every contract made by a local board, or by an urban authority, whereof the value or amount exceeded £50, should be in writing, and sealed with the common seal of such authority, a verbal contract made by defendants (a local board), even for works which were necessary for the purposes of defendants, was held not to bind them, the works never having been actually executed, though plans had been submitted to and approved of by them; and it was held that even the cost of the plans (£94), could not be recovered (*o*).

Similarly in the case of companies incorporated under the Companies Acts, the company is not bound by the acts of its directors for objects which the company has no power to entertain, *i.e.*, which are outside the scope of the memorandum of association of the company. Such acts are *ipso facto* void, and no amount of assent or acquiescence on the part of the shareholders of the company can ratify them (*p*).

(*m*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; L. R. 4 C. P. 617.

(*n*) See sec. 85 of the Public Health Act, 1848 (11 & 12 Vic. c. 63), and sec. 174 of the Public Health Act, 1875 (38 & 39 Vic. c. 55).

(*o*) *Hunt* v. *Wimbledon Local Board*, L. R. 3 C. P. D. 208; L. R. 4 C. P. D. 48.

(*p*) *Ashbury Railway Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653, and *ante*, p. 209, where the distinction is pointed out between the effect of acts *ultra vires* the memorandum, and acts *ultra vires* the Articles of Association.

And a similar rule holds good with respect to the powers of directors of other incorporated companies. Thus it has been laid down that directors cannot act in opposition to the purpose for which their company was incorporated, but that, short of that, they may bind the body just as corporations in general may do (*q*).

But in some cases, although the company itself would not be liable, directors who have made false representations, on the faith of which others have acted, may themselves be personally liable to the parties who have acted on the faith of those representations, and may be estopped, as against such parties, from denying that the representations were true (*r*).

On the other hand, acts of the directors of companies incorporated under the Companies Acts, which, though *ultra vires* the powers given to them by the Articles of Association, are within the scope of the memorandum, may in certain cases be ratified by the assent or acquiescence of the general body of shareholders (*s*), and it

(*q*) Per Lord St. Leonards in *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. Cas. 347, at pp. 373, 381; see also as to the powers of directors, *Bargate* v. *Shortridge*, 5 H. L. Cas. 297 (questioned in *Read's Case*, L. T. Eur. Arb. 10, 13); *National Exchange Co. of Glasgow* v. *Drew*, 2 Macq. 103; *Ernest* v. *Nicholls*, 6 H. L. Cas. 401; and *Chambers* v. *Manchester & Milford Ry. Co.*, 5 B. & S. 588.

(*r*) *Cherry* v. *Colonial Bank of Australasia*, L. R. 3 P. C. 24, and *ante*, p. 315; *Richardson* v. *Williamson*, L. R. 6 Q. B. 276; *Weeks* v. *Propert*, L. R. 8 C. P. 427; *Collen* v. *Wright*, 26 L. J. Q. B. 147; 27 L. J. Q. B. 215; *Chapleo* v. *Brunswick Building Society*, L. R. 5 C. P. D. 331; L. R. 6 Q. B. D. 696.

(*s*) *e.g.*, an invalid forfeiture of shares. See Buckley on the Companies Acts (4th ed.), pp. 419, 425, and cases there cited.

appears that the company are absolutely bound by such acts if done with strangers acting *bonâ fide* with the company, and that if the acts are done with the shareholders of the company they are voidable only by the other shareholders taking active steps to have them set aside (*t*). And a similar rule applies to the acts of directors of incorporated companies generally. Thus it has been held, that the mere circumstance of a covenant by directors in the name of the company being *ultra vires* as between them and the shareholders, though it may be a question between them and the shareholders, does not disentitle the covenantee to sue on it (*u*).

The mere fact that the act of a company is illegal does not prevent the company being estopped, as against a stranger who has acted on it *bonâ fide*, and without notice of the illegality, from setting it up as a defence (*v*). This is illustrated by the following case:—Shares in a limited company were issued as fully paid up shares, by virtue of a contract not registered as required by the Companies Act, 1867, s. 25. The company issued

(*t*) Buckley on the Companies Acts (4th ed.), p. 443, citing *Spackman* v. *Evans*, L. R. 3 H. L. 171, 244.

(*u*) Per Lord St. Leonards in *Eastern Counties Ry. Co.* v. *Hawkes*, 5 H. L. Cas. 347, pp. 368—372, citing *Mayor of Norwich* v. *Norfolk Ry. Co.*, 4 E. & B. 397.

(*v*) Per Blackburn, J., in *Webb* v. *Commissioners of Herne Bay*, L. R. 5 Q. B. 642, citing *Freeman* v. *Cooke*, 2 Ex. 654, and *In re Bahia & San Francisco Ry. Co.*, L. R. 3 Q. B. 583. A mere irregularity in the issue of securities cannot be set up by the company, even against the original holder of the securities, if he has a right to presume *omnia rite esse acta*. See per Kay, J., in *In re Romford Canal Co.*, L. R. 24 Ch. D. 85, at p. 92, citing *Fountaine* v. *Carmarthen Ry. Co.*, L. R. 5 Eq. 316.

certificates of these shares as fully paid-up shares. Some of them were afterwards transferred for value to a person who had no notice of any irregularity in their issue, and took them as fully paid-up on the faith of the certificates. The company having been ordered to be wound up, the official liquidator sought to make the transferee liable as the holder of shares on which nothing had been paid. Held, that as against a transferee who took the shares without notice that they had not been paid up in cash, the company was estopped by the certificates from saying that they had not been so paid up, and that the official liquidator was in the same position (*x*). Per Lord Blackburn, "Now in the present case the company has issued under the seal of the company a certificate in the form which is set out in the case, in which the company has asserted that these shares have been fully paid up. These certificates are issued under the directions of the Act of Parliament, and are made *primâ facie* evidence of all that they state; only *primâ facie* evidence. The certificates are given and issued for the very purpose of enabling the person who holds them to go to others for the purpose, amongst others, of selling the shares, and to say:—'Here is the certificate; you see I am a shareholder, as the company has so certified

(*x*) *Burkinshaw* v. *Nicolls*, L. R. 3 App. Cas. 1004, reported in the Court below (L. R. 7 Ch. D. 533), as *In re British Farmers' Pure Linseed Co.* The estoppel applies in favour of all purchasers from transferees for value without notice, whether such purchasers have notice or not, and whether they are officers of the company or not; but it does not apply in favour of the original transferees if they have notice. See *Burkinshaw* v. *Nicolls* (*ibid.*), and *In re Stapleford Colliery Co., Barrow's Case*, L. R. 14 Ch. D. 432.

it. Act upon that, and bargain with me upon the supposition that I am.' That is the very object with which they are issued under the company's seal. Now when the company has so issued the certificate under the company's seal to enable a person to induce others to buy the shares, and more especially when the company has registered the transfer solely in consequence of that, it would be in the highest degree an injustice to say that the company shall, as against that person, be permitted to say :—'There was a mistake or inaccuracy in the representations that the shares have been fully paid up.' You would be entitled to say, as against everybody else who had acted upon it, that it worked an estoppel. I think the liquidator would be exactly in the same position." His lordship afterwards observes that the trustee, whose *cestui que trust* had, by faith of this representation, become a shareholder, was entitled to an estoppel as much as if the *cestui que trust* had had the shares transferred into his name (*y*).

And there may be an equity on the part of a transferee for value of securities, to restrain the company from pleading the invalidity of their issue, even where the invalidity would be a defence at law to an action by the transferor against the company; *e.g.*, if the original

(*y*) Cf. *In re European Society Arbitration Acts, Ex parte Liquidators of British Nation Life Assurance Association*, L. R. 8 Ch. D. 679, where a contract by a company established under a deed of settlement, which was *ultra vires* the deed of settlement, was not submitted to a general meeting of the shareholders, or made known to the shareholders generally, and did not influence the conduct of any of the shareholders, was held not to bind the company.

conduct of the company, in issuing the securities, was such that the public were justified in treating it as a representation that they were legally transferable (*z*).

A similar rule has been laid down with respect to the illegal acts of other incorporated companies. Thus where a railway company issued Lloyd's bonds contrary to statute, and therefore illegally, but on the face of the bonds appeared representations which, if true, made the transaction legitimate, it was held, on a claim being made by holders of the bonds against the company's assets, that the claim was good for those sums of money in respect of which the bonds were given, and of which the company had had the benefit for its legitimate purposes (*a*).

Moreover a company may be estopped from setting up the illegality of its acts in defence to an action by a person who has been damaged by such acts, even though the person so damaged would not be estopped from setting up the illegality against the company if it would assist his case. Thus where a railway company was guilty of an illegality by working steamboats, not being

(*z*) Per Kay, J., in *In re Romford Canal Co.*, L. R. 24 Ch. D. 85, at p. 29, citing *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387. As to the effect of ignorance on the part of the company of material facts, on an improper transfer of shares by them, where the transferee has not acted upon any representation made by the company, see *Hare* v. *L. & N. W. Ry. Co.*, Johns. C. C. at p. 726, cited in Lindley on Partnership (4th ed.), vol. i. p. 135, which also contains a useful discussion on estoppel, so far as it affects company cases.

(*a*) *In re Cork & Youghal Ry. Co.*, L. R. 4 Ch. App. at p. 748. And where a company sets up the illegality of its acts as a defence, the onus of proving the illegality rests on the company; see per Parke, J., in *Hill* v. *Manchester & Salford Waterworks Co.*, 2 B. & Ad. 544, at p. 553.

authorized by law to work them, it was held that the company could not set up the illegality in answer to a claim for damages arising out of the working of the steamboats (*b*).

Not only may the company itself be estopped from disputing the legality of its acts, as against persons who have acted upon them, but so also may the persons themselves who have so acted. For instance, a shareholder to whom shares have been illegally issued, may be estopped, in an action for payment of calls brought against him by the company, from disputing the legality of the issue, by having allowed himself to be registered as the owner of the shares, and by having received dividends thereon (*c*), or he may be estopped by having subsequently paid calls on the shares (*d*). And where the shareholders in an old company were registered as having transferred their shares to a new company, and share certificates in the new company were sent to each shareholder in the old company, and it was doubtful whether the agreement for the transfer was binding on the shareholders, it was held, that a shareholder who had acknowledged the receipt of the certificates and had retained them, was a shareholder in the new company, but that a shareholder who had taken no notice of the communication, and had done nothing in relation to the

(*b*) *Doolan* v. *Midland Ry. Co.* L. R. 2 App. Cas. 792.

(*c*) *West Cornwall Ry. Co.* v. *Mowatt*, 15 Q. B. 521; *Hull Flax Co.* v. *Wellesley*, 6 H. & N. 38; and per Lord Cairns in *In re New Zealand Banking Co., Sewell's Case*, L. R. 3 Ch. App. 131.

(*d*) *Irish Peat Co.* v. *Phillips*, 1 B. & S. 598; *In re Barned's Banking Co., Peel's Case*, L. R. 2 Ch. App. 674.

agreement, was not a shareholder in the new company (*e*). So also where shares were irregularly (*f*) allotted to a director upon his application, and he afterwards attended a directors' meeting, confirmed the allotment to himself, and joined in passing a resolution that the shares allotted to him should be paid up in full forthwith, it was held that he was estopped from disputing the validity of the allotment (*g*). And individual shareholders who have ratified by acquiescence acts which are *ultra vires* the directors may be estopped by them (*h*). But, as has been pointed out (*i*), this does not apply to acts which are *ultra vires* the company, and therefore void (*k*). This is illustrated by the following case :—

(*e*) *In re Empire Assurance Corporation, Challis's Case, Somerville's Case*, L. R. 6 Ch. App. 266.

(*f*) For the difference between the effect of an irregular and invalid allotment of shares, see *Murray* v. *Bush, In re Agriculturist Cattle Insurance Co.*, L. R. 6 H. L. 37, and *York Tramways Co.* v. *Willows, infra.*

(*g*) *York Tramways Co.* v. *Willows*, L. R. 8 Q. B. D. 685, following *Hallows* v. *Fernie*, L. R. 3 Ch. App. 467, *Harward's Case*, L. R. 13 Eq. 30, and *Fowler's Case*, L. R. 14 Eq. 316; and distinguishing *Howbeach Coal Co.* v. *Teague*, 29 L. J. Ex. 137.

(*h*) *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P. 43. And as to acquiescence in such acts on the part of the general body of shareholders, see *ante*, p. 382.

(*i*) See *ante*, p. 381.

(*k*) But it seems that even acts done in contravention of the memorandum of association may be rendered valid for some purposes; *e.g.*, where shares have been subdivided into shares of smaller amount, the subdivision being outside the powers given by the memorandum of association, and therefore void, if the original shares can be "earmarked" in the hands of a transferee, the transfer will be held effectual, and the transferee liable to be placed on the list of contributories. See *In re Financial Corporation, Feiling & Rimington's Case*, L. R. 2 Ch. App. 714, and *In re New Zealand Banking Corporation, Sewell's Case*, L. R. 3 Ch. App. 131.

Two incorporated banking companies, the Bank of Hindustan and the Imperial Bank of China, (under the powers contained in their respective articles of association) agreed to amalgamate, the business of the latter company being transferred to the former, and the shareholders of the Imperial Bank of China having the option of taking newly-created shares in the Bank of Hindustan at a premium, part of which was to be paid out of the funds of the Imperial Bank. The Bank of Hindustan issued circulars, informing the shareholders in the Imperial Bank of the arrangement which had been made and intimating to them that they had an option to take such new shares on the terms specified. Defendant, a shareholder in the Imperial Bank, in consequence, in 1864, applied for and obtained an allotment of twenty-five shares, paid a portion of the deposit and premium thereon, and by his letter of application engaged to pay the residue on a given day. Several calls were afterwards made, of which defendant had notice; but he never repudiated his liability until an action was brought against him in 1867 for non-payment of these calls. In 1868, the supposed amalgamation of the two banks was, by a decree of a vice-chancellor in a suit by dissentient shareholders in the Imperial Bank, declared to be void. Held, that the directors of the Bank of Hindustan had no power to issue the new shares, and that defendant was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Bank of Hindustan (*l*).

(*l*) *Bank of Hindustan, &c.* v. *Alison*, L. R. 6 C. P. 54 and 222; see also *Re London & Northern Insurance Co., Stace & Worth's*

And even a member of the company who has himself participated in committing an act which is *ultra vires* the company, would not be estopped from setting up its illegality against the company. Thus, in the case of a railway company, where a committee was authorized by Act of Parliament to make calls in a certain manner, and they made calls in a manner that was *ultra vires* the powers given them by the Act; in an action by the company against defendant, who was a member of the committee, for money due on some of the calls, others of which he had handed over, it was held, that defendant was not estopped by having joined in making the calls, or by his payment of part of them, from disputing their validity (*m*).

Case, L. R. 4 Ch. App. 682. It would have been otherwise, however, if the shares had been originally well created, even though the amalgamation itself was void. See *Hare's Case*, L. R. 4 Ch. App. 503; *In re Empire Assurance Corporation, Challis's Case*, L. R. 6 Ch. App. 266; and *In re Bank of Hindustan, China, & Japan, Campbell's Case & Hippisley's Case*, L. R. 9 Ch. App. pp. 1 and 15.

(*m*) *Stratford & Moreton Ry. Co.* v. *Stratton*, 2 B. & Ad. 518.

CHAPTER XI.

PLEADING THE ESTOPPEL.

Formerly matters of estoppel were usually raised on the pleadings. It is however somewhat doubtful, according to the older authorities, whether it was necessary that an estoppel by record should appear on the pleadings, and whether if it did not, it was conclusive if offered in evidence. On the other hand the balance of authority seems to be in favour of the proposition that formerly an estoppel by deed ought to have been raised on the pleadings, and that an estoppel in pais need not.

An estoppel might be raised on the pleadings, either by means of a special plea, or by special (*a*) or general (*b*) demurrer. There are numerous instances of an estoppel being raised by demurrer (*c*). But now by the new rules (*d*) demurrers are abolished, and any party shall be entitled to raise by his pleading any point of law (*e*). And the defendant or plaintiff (as the case may

(*a*) *Beckett* v. *Bradley*, 14 L. J. C. P. 3.

(*b*) *Kemp* v. *Goodal*, 1 Salk. 277; *Heath* v. *Vermeden*, 3 Levinz. 146; *Palmer* v. *Ekins*, 2 Str. 817.

(*c*) *Bowman* v. *Taylor*, 2 A. & E. 278; *Lainson* v. *Tremere*, 1 A. & E. 792; *Hills* v. *Laming*, 9 Excheq. 256; *Armani* v. *Castrique*, 13 M. & W. at p. 451 (per Pollock, C. B.).

(*d*) R. S. C. 1883; Order XXV., Rule 1.

(*e*) Order XXV., Rule 2.

be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, statute of limitations, release, payment, performance, facts showing illegality either by statute or common law, or statute of frauds (*f*). The above rules therefore seem to make it necessary, or at any rate advisable, in all cases to raise any matters that are relied upon by way of estoppel, on the pleadings. No form of a plea of estoppel is given in the forms in the Appendix to the new rules, but presumably such pleas must be as brief and concise as possible, and as nearly as possible in accordance with the forms of pleadings there given. Certain forms of pleas of estoppel are however given in the last chapter of Bigelow's work on estoppel (*g*) which may be found useful in some cases, if abridged in accordance with the spirit of the new rules.

As the question may occasionally arise, how far an estoppel is conclusive even if it does not appear on the pleadings, it may be useful to enter into some discussion of the authorities on the subject of pleading the estoppel.

(*f*) Order XIX., Rule 15.

(*g*) Bigelow on Estoppel (2nd ed.), pp. 543—558. See also the forms given in Allen's forms of Pleadings (ed. 1883), pp. 197, 224, 225. And, as to the mode of framing the plea of estoppel under the old system of pleading, see *Doe* v. *Welsman*, 2 Ex. 368; *Wilkinson* v. *Kirby*, 15 C. B. 430; *General Steam Navigation Co.* v. *Guillou*, 11 M. & W. 877; Co. Litt. 303 b (*e*); and *Litchfield* v. *Ready*, 5 Ex. at p. 945.

The general rule formerly was that an estoppel ought to be pleaded if there was an opportunity, and that if a party did not rely upon the estoppel in his pleading, but the matter was put in issue and went to the jury, they were not bound by the estoppel, but might find the truth notwithstanding (*h*). And in such a case the matter which, if pleaded, would have been conclusive, became merely evidence, which, like other evidence, is open to contradiction (*i*). For, says an old authority, the jurors ought not, on pain of attaint, to take notice of matters of estoppel which were given in evidence between the parties, as they are strangers to the conclusion between the parties, and are no more estopped than the judges are (*k*).

Thus a recital was not conclusive evidence at the trial, if the party seeking to rely upon it had not pleaded it by way of estoppel, but had joined issue (*l*). And a judgment for plaintiff in an action of ejectment was not

(*h*) *Goddard's Case*, Co. Rep. vol. i. p. 432, and remarks thereon in Smith's L. C. (8th ed.), vol. ii. pp. 821, 822; *Palmer* v. *Ekins*, 2 Str. 817; *James* v. *Landon*, 1 Cro. Eliz. 36; *Speake* v. *Richards*, Hob. 207; *Feversham* v. *Emerson*, 11 Ex. 385; *Young* v. *Raincock*, 7 C. B. at p. 338; *Doe* v. *Huddart*, 2 C. M. & R. 316; *Cor* v. *Cannon*, 4 Bing. N. C. 453; *Ashpitel* v. *Bryan*, 3 B. & S. at p. 489; *Gregg* v. *Wells*, 10 A. & E. 90; and 1 Wms. Saund. (6th ed.), 325 *a*, note (*d*).

(*i*) *Outram* v. *Morewood*, 3 East, 346; *Kinnersley* v. *Orpe*, 2 Dougl. 517; *Wilson* v. *Butler*, 4 Bing. N. C. 748.

(*k*) *Pleadall* v. *Pleadall*, Moore, 96; *Lambert* v. *Cameret*, Comb. 446; *Weale* v. *Lower*, Pollexfen, 67. But see *contra*, *Goddard's Case*, Co. Rep., vol. i. p. 432; *Doe* v. *Huddart*, 2 C. M. & R. 316; *Needler* v. *Bishop of Winchester*, Hob. 227 (Attorney-General *arguendo*); *Feversham* v. *Emerson*, 11 Ex. 385.

(*l*) *Bowman* v. *Rostron*, 2 A. & E. 295.

(before the Common Law Procedure Acts) conclusive evidence of plaintiff's title in a subsequent action for mesne profits or ejectment, unless it was pleaded as an estoppel (*m*). So also a verdict and judgment in a former action, which if pleaded would have operated as a bar, if given in evidence under the general issue, was not conclusive, but only evidence to go to the jury (*n*). Again, if a sentence of court-martial was not pleaded by way of estoppel in a subsequent civil action, it was only evidence, and not conclusive evidence, of the truth of the matter adjudicated upon in the sentence (*o*). Further, matter relied upon by the petitioner in divorce, as an estoppel to respondent's answer, must be pleaded in the replication (*p*).

A case, however, might arise in which a record in a former action could not be pleaded as an estoppel, on account of its not being strictly a legal estoppel, and it might nevertheless be conclusive evidence to go to the jury. Thus in an action for diverting water from

(*m*) *Doe* v. *Huddart*, 2 C. M. & R. 316; *Doe* d. *Strode* v. *Seaton*, 2 C. M. & R. 728; *Matthew* v. *Osborn*, 13 C. B. 919; *Doe* v. *Wright*, 10 A. & E. 763; *Litchfield* v. *Ready*, 5 Ex. at p. 945; see, however, *Aslin* v. *Parkin*, 2 Burr. 665; *i.e.*, unless there was no opportunity of pleading it, *Armstrong* v. *Norton*, 2 Ir. C. L. R. 96.

(*n*) *Rawlins's Case*, Co. Rep., vol. ii. p. 422, note (*c*); *Vooght* v. *Winch*, 2 B. & Ald. 662; but see *contra*, in the case of estoppels by record, *Needler* v. *Bishop of Winchester*, Hob. 227, and opinions of judges in *Duchess of Kingston's Case*, Appendix B., p. 421. However, at any rate an estoppel of *quasi* record ought to be pleaded; see *R.* v. *Cambrian Ry. Co.*, L. R. 4 Q. B. 320.

(*o*) *Hannaford* v. *Hunn*, 2 C. & P. 148; *Warden* v. *Bailey*, 4 Taunt. 67.

(*p*) *Robinson* v. *Robinson*, L. R. 2 P. D. 75.

plaintiff's mill, the record of a former trial for a similar injury, between the same plaintiff and the same defendant and another person (not party to the present action) was produced in evidence as to the right to the water; and Lord Ellenborough said, that though the record of the judgment in the former action could not be deemed a legal estoppel (the parties being different), so as to conclude the rights of the parties, yet it was binding so far that he should think himself bound to tell the jury to consider it as conclusive as to the rights of the parties (*q*).

The rule that an estoppel should be pleaded, only applied where the party who omitted to plead the estoppel had an opportunity of pleading it (*r*). Thus, where the defendant in a judgment was tenant in tail and died, and, upon a *scire facias* against the heir and terre-tenants, the issue in tail was returned heir and terre-tenant and warned, and judgment was given against him by default, and the entailed lands were extended in *elegit*; and, upon an ejectment brought by the tenant by *elegit*, the deed of entail was given in evidence, and all this matter specially found; it was resolved, that because the defendant had an opportunity to have pleaded this once to the *scire facias*, and had not pleaded it, he was estopped to say it now: and so, a judgment that did not bind the issue in tail at first, was, by his neglect of pleading his title to the *scire facias*, made an unavoidable

(*q*) *Strutt* v. *Bovington*, 5 Esp. 59.

(*r*) Per Parke, B., in *Freeman* v. *Cooke*, 2 Exchcq. at p. 662, citing *Trevivian* v. *Lawrence*, Smith's L. C. (8th ed.), vol. ii. pp. 799—801, and *Magrath* v. *Hardy*, 4 Bing. N. C. 782.

charge upon him (*s*). And, again, where plaintiff declared upon a demise by indenture, and defendant pleaded *nil habuit in tenementis;* if plaintiff did not plead the indenture by way of estoppel, but took issue on the plea, the jury, notwithstanding the indenture, might find that plaintiff (the lessor) had nothing in the tenements *tempore dimissionis*, and give a verdict for defendant; but if, instead of *nil habuit in tenementis*, defendant had pleaded *nil debet*, and issue thereon, and then defendant gave in evidence that plaintiff *nil habuit in tenementis*, plaintiff might in such case take advantage in evidence of the indenture by way of estoppel, because he had not had that advantage of it in pleading, as he had in the other case (*t*).

A good example of the rule that if the party had no opportunity of pleading the estoppel, the jury would be bound by the estoppel, or rather the Court would give effect to it in construing the verdict (*u*), is furnished by

(*s*) *Gilburne* v. *Rack*, 2 Sid. 12; cited as *Tilborne* v. *Rag* by Holt, C. J., in *Trevivian* v. *Lawrence*, 2 Lord Raymond, 1051; see also *Hannor* v. *Mase*, Hob. 283; Vin. Ab. Estop. p. 486, citing Bro. Estop. pl. 112. And in such a case the advantage of the estoppel was lost for ever, and it could not be pleaded in any subsequent proceedings. See *ibid.*

(*t*) *Trevivian* v. *Lawrence*, 3 Salk. 151. See also as to the rule laid down in *Trevivian* v. *Lawrence*, the remarks of Parke, B., in *Litchfield* v. *Ready*, 5 Ex. at p. 945; and see further as to pleading estoppels, Trials per Pais, vol. i. pp. 236, 237, and pp. 283—285.

(*u*) *Sutton's Case*, 1 Cro. Eliz. 140; *Trevivian* v. *Lawrence*, Smith's L. C. (8th ed.), vol. ii. pp. 799—801; *Magrath* v. *Hardy*, 4 Bing. N. C. 782; judgment of De Grey, C. J., in *Duchess of Kingston's Case*, Appendix B., p. 421; per Lord Campbell, C. J., in *R.* v. *Blakemore*, 2 Den. C. C. R. at p. 426; *Armstrong* v. *Norton*, 2 Ir. C. L. R. 96.

the old action of ejectment, in which there were no pleadings, except the general plea of not guilty. Thus where, in an action of ejectment on a lease for years made by defendant to plaintiff, defendant pleaded not guilty, and there was a special verdict to the effect that defendant had nothing in the lands when he made the lease to plaintiff, *quære* whether this was a verdict for plaintiff or defendant: for if there was a lease, defendant would be estopped from saying that he had nothing in the land. And it appears that the Court were equally divided in opinion; but it is stated in the marginal note that plaintiff shall have judgment, for that the jury might find the estoppel on the general issue (*x*).

The jury were bound by the estoppel, if it appeared on the face of the same record in which issue was joined between the parties: for the jury could not find anything contrary to that which the parties themselves affirmed and admitted of record, although it was contrary to the truth (*y*).

(*x*) *Sutton's Case*, 1 Cro. Eliz. 110; and as to pleading matters of defence that arise pending the action, see now R. S. C. 1883, Order XXIV., Rules 1, 2. In *In re Defries, Nordon* v. *Levy*, 48 L. T. 703, defendant was allowed at the trial to make use of a judgment by way of estoppel, which was not given till after statement of defence had been filed, but see now R. S. C. 1883, Order XXIV., Rule 2.

(*y*) *Goddard's Case*, Co. Rep., vol. i. p. 432; *Doe* v. *Huddart*, 2 C. M. & R. 316; *Needler* v. *Bishop of Winchester*, Hob. 227 (Attorney-General *arguendo*); *Feversham* v. *Emerson*, 11 Ex. 385. See *contra*, *Lambert* v. *Cameret*, Comb. 446, where, in proceedings on a writ of error, evidence of plaintiff's death before action was allowed to go to the jury, though it was admitted by defendant's plea in the action that plaintiff was alive at time of action brought.

An exception to the rule that the jury ought not to take notice of matters of estoppel unless they were pleaded, is made by some of the old authorities in the case of estoppels which bound the interest of the land. Thus it is laid down by Lord Coke, that in the case of estoppels which bound the interest of the land, as the taking of a lease of a man's own land by deed indented, and the like, if the jury found the estoppel by special verdict, the Court ought to give judgment in accordance with their finding (*z*). And in a case where the estoppel was not pleaded and was of the above nature, and defendant's counsel objected that an estate by estoppel should not be favoured in equity, and that the jury were not bound to find it, and that if it were found, the Court should judge the lease void, it was answered by the judges as follows: "The law, as it seemeth, is so in cases of obligations, covenants, or personal contracts, which cannot be turned into an estate; but in other cases, where the estate is bound by the conclusion and converted into an interest, although the jury find the matter at large, yet the Court shall adjudge according to the law, that the estate is good by reason of the estoppel" (*a*). On the other hand it was decided in another case, that if one made a lease for years by indenture, and had nothing in the land, and afterwards purchased the land and aliened it, although it was a good lease for years by estoppel against him and his alienee by way of pleading, and bound them, yet that it did not bind the jury, for that they might find the truth, and that if the jury did find

(*z*) Co. Litt. 227 a. (*a*) *Weale* v. *Lower*, Pollexfen, 67.

the truth, the Court should judge it to be a void lease (*b*).

A further exception to the above rule, that an estoppel must be pleaded, was made in the case of actions of *assumpsit*. The general rule in these actions was that whatever defeated the promise might be given in evidence on *non assumpsit*. Thus in a case in the Lord Mayor's Court, in which plaintiff, a mariner, sued in *assumpsit* for his wages, to which there was a plea of *non assumpsit;* and it appeared that plaintiff had previously sued in the Admiralty Court for his wages, and judgment had been given against him, the Recorder (afterwards Lord Chancellor) allowed the judgment in the Admiralty Court to be given in evidence against plaintiff (*c*).

There were also other exceptions to the above rule, in the case of certain estoppels by record. Thus it appears that a verdict of guilty upon an indictment for non-repair of a road was conclusive evidence, on a subsequent indictment against the same parish for non-repair of the same road, of its liability to repair, even though it was not pleaded by way of estoppel (*d*); and, speaking generally, a judgment *in rem* was conclusive evidence to go to the jury, even though not pleaded as an estoppel (*e*).

(*b*) *Isham* v. *Morrice*, Cro. Car. 112.

(*c*) See the case cited in *Burrows* v. *Jemino*, 2 Str. 733, Appendix B., p. 415; see also *Stafford* v. *Clark*, 2 Bing. 377.

(*d*) *R.* v. *St. Pancras*, Peake's N. P. C. 219.

(*e*) *R.* v. *St. Pancras*, *ibid.*; *Cammell* v. *Sewell*, 3 H. & N. at p. 647. And as to pleading ecclesiastical sentences, see Appendix A., p. 409.

Foreign judgments stand upon a footing of their own. They are, as has been pointed out (*f*), not strictly speaking records, and therefore it appears, that to an action in England on a colonial judgment, the plea of *nul tiel record* is not a good plea (*g*), and a foreign sentence of nullity of marriage cannot be pleaded in bar to a suit in England for restitution of conjugal rights (*h*); moreover, a foreign judgment in admiralty cannot be pleaded as an estoppel on collateral matters (*i*). But judgments of foreign courts are treated as conclusive in England as judgments of courts of competent jurisdiction (*k*). And, it seems, that in an action in England on a foreign judgment, the judgment should, if there is an opportunity, be pleaded by way of estoppel (*l*). Moreover, it is advisable now, for the reasons given above (*m*), to plead foreign judgments in all cases where they are relied upon as conclusive. And the plea should show that the foreign court had jurisdiction, and that the foreign judgment was final and conclusive when rendered (*n*). Moreover, if the defence rests on want of personal service, or on want of notice to defendant, in the foreign proceedings, the plea to that effect must be

(*f*) *Ante*, p. 18.

(*g*) *Chapman* v. *Sherrie*, 5 Ir. R. C. L. 36.

(*h*) Per Sir E. Simpson in *Scrimshire* v. *Scrimshire*, 2 Hagg. Consist. 395, *ante*, p. 167.

(*i*) *Hobbs* v. *Henning*, 17 C. B. N. S. 791.

(*k*) *Ante*, pp. 152, 153; see also *Burrows* v. *Jemino*, 2 Str. 733, Appendix B., p. 415; *Bluet* v. *Bampfield*, 1 Cases in Chanc. 237, Appendix B., p. 421.

(*l*) *Doe* v. *Huddart*, 2 C. M. & R. 316; *Vooght* v. *Winch*, 2 B. & Ald. 662.

(*m*) *Ante*, p. 392.

(*n*) *Douglas* v. *Forrest*, 4 Bing. 686; *Frayes* v. *Worms*, 10 C. B. N. S. 149; *Plummer* v. *Woodburne*, 4 B. & C. 625.

full and explicit (*o*). And, speaking generally, if a judgment, whether domestic or foreign, is relied upon as an estoppel, the plea of *res judicata* must be specific; and it must appear that the matter has been controverted as well as adjudicated upon (*p*).

Precedents of pleas to actions on foreign judgments, setting forth, (1) That defendant was not resident within the jurisdiction of the foreign court, nor subject to the foreign laws, (2) That he was not a native of the foreign country, (3) That he was not duly served with process in the foreign court, (4) That he did not appear in the foreign action, and (5) That he had no notice or means of defending himself in the foreign action, are given in *Vallée* v. *Dumergue* (*q*), and *Meeus* v. *Thellusson* (*r*). These pleas are of course subject to the propositions stated in the chapter on foreign judgments (*s*). And in *Duflos* v. *Burlingham* (*t*), which was an action in England on a French judgment, and in which defendant pleaded, first, that he was not duly served with process, that he had no notice of the alleged action, nor had he the opportunity, according to the rules and regulations of the French court, of defending himself; and secondly, that the action in which the judgment was obtained, was upon a contract entered into in England, that, before the judgment was obtained, he was never resident or

(*o*) *Maubourquet* v. *Wyse*, 1 Ir. R. C. L. 171; *Reynolds* v. *Fenton*, 3 C. B. 187; *Vallée* v. *Dumergue*, 4 Ex. 290.

(*p*) Per Willes, J., in *Longmead* v. *Maple*, 18 C. B. N. S. 255, at pp. 270, 271.

(*q*) 4 Ex. 290.

(*r*) 8 Ex. 638.

(*s*) See *ante*, pp. 123—151.

(*t*) 34 L. T. 688.

domiciled within the jurisdiction of the French court, nor was he a native of, nor did he ever owe allegiance to France, nor was he, at the time of contracting the alleged obligation, in France or within the jurisdiction of the French court; it was held, on demurrer, that the first of these pleas was bad, and the second good.

Another exception to the above rule, that an estoppel should be pleaded, existed in the case of estoppels in pais. These in certain cases need not formerly have been pleaded (*u*). The law on this point is thus stated by an eminent authority: "With respect to estoppels in pais, in certain cases there is no doubt they need not be pleaded, in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law, and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels in pais (*x*)." It appears, however, from an old authority, that the jury were not bound to find an estoppel in pais or by matter in writing when given in evidence, but that they might find it, and that, if they did, the court was bound to give judgment accordingly (*y*). And an

(*u*) Per Wightman, J., in *Ashpitel* v. *Bryan*, 3 B. & S. at p. 489; *Sanderson* v. *Collman*, 4 Scott's N. R. 638; *Lyon* v. *Reed*, 13 M. & W. 285; 1 Wms. Saund. (6th ed.), 325 *a*, note (*d*).

(*x*) Per Parke, B., in *Freeman* v. *Cooke*, 2 Ex. at p. 662.

(*y*) *Needler* v. *Bishop of Winchester*, Hob. 227.

estoppel in pais might be pleaded as an estoppel (*z*). And, since the new rules, it would be advisable to plead it as such.

(*z*) *Sanderson* v. *Collman*, 4 Scott's N. R. 638; *Darlington* v. *Pritchard*, 4 M. & G. 783; per Parke, B., in *Hallifax* v. *Lyle*, 3 Ex. at p. 453; and notes to *Veale* v. *Warner*, 1 Wms. Saund. (ed. 1871), at p. 576.

APPENDIX.

APPENDIX A.

PREFATORY NOTE TO THE DUCHESS OF KINGSTON'S CASE.

THE question that arose in the *Duchess of Kingston's case*, was whether a sentence in the spiritual court, in a suit of jactitation of marriage brought by A. (a woman), against B., declaring that A. was a spinster and free from all matrimonial contract with B., was conclusive evidence of that fact, so as to estop the crown, in a subsequent criminal prosecution against A. for bigamy, from proving that A. *was* married to B. at the time of her marriage with C.

Some light may be thrown upon the question by noticing some of the cases relating to the jurisdiction of the ecclesiastical courts, which were decided prior to the *Duchess of Kingston's case*.

The ecclesiastical courts, or courts Christian (*curiæ Christianitatis*), were one of the species of courts in which the civil and canon laws were permitted, under different restrictions, to be used.

The courts of common law had the superintendency over these courts: to keep them within their jurisdiction, to determine wherein they exceeded it, and to restrain and prohibit (*a*) any excess: and, in case of contumacy, to punish the officer who executed, and in some cases the judge who enforced, the sentence so declared to be illegal. The common law also reserved to itself a paramount authority in the exposition of all such acts of parliament as concerned either the extent of these courts or the matters depending before them. And therefore, if these courts either refused to allow these acts of parliament, or expounded them in any other sense than what the common

(*a*) The Queen's Bench, however, did not, as a rule, exercise its jurisdiction as to prohibition on the application of a person who was a stranger to the proceedings in the Ecclesiastical Court. See *R. v. Sir T. Twiss*, L. R. 4 Q. B. at p. 113.

law put upon them, the superior courts at Westminster would grant prohibitions to restrain and control them. An appeal lay from these courts to the sovereign, in the last resort, which proves that the jurisdiction exercised in them is not derived from any intrinsic authority of their own (*b*).

Probate of Wills of Personalty.—The ecclesiastical courts had *exclusive* jurisdiction over the probate of wills of *personal* estate. Before 20 & 21 Vic. c. 77, proof of the will was given by the executor before the ordinary, *i.e.*, as a general rule, the bishop of the diocese.

Administration.—They had, before 20 & 21 Vic. c. 77, transferring the jurisdiction to the Probate Court, *exclusive* jurisdiction over the administration of the estates of intestates, which were granted by the ordinary or the metropolitan (*c*).

Distribution.—They had a *concurrent* jurisdiction with the Court of Chancery with respect to distribution (*d*).

Marriage.—They had, before 20 & 21 Vic. c. 85, by which a new court, called the Court of Divorce and Matrimonial Causes, was established, *exclusive* jurisdiction in divorce and alimony, in suits for jactitation of marriage, in suits for restitution of conjugal rights, and in suits to compel the celebration of marriages in pursuance of marriage contracts (*e*).

Ecclesiastical Jurisdiction.—The ecclesiastical jurisdiction of the ecclesiastical courts remains, in many respects, the same as it was formerly. It is exercised by, first, the Archdeacon's Court; secondly, the Consistory Court of the Bishop; thirdly, the Court of Arches (including the Court of Peculiars); and fourthly, the Judicial Committee of the Privy Council, sitting as a final Court of Appeal (*f*).

The judgments of the ecclesiastical courts were formerly as much subject to the equity of the Court of Chancery, as were the judgments of the common law courts (*g*).

It has, however, been laid down that the temporal courts could not examine the decisions of the ecclesiastical judges in matters

(*b*) See Stephen's Commentaries (ed. 7), vol. i., pp. 67, 68.

(*c*) Stephen's Commentaries (ed. 7), vol. ii., p. 193.

(*d*) *Bouchier* v. *Taylor*, 4 Brown's Cases in Parliament, 708, and Hargrave's Tracts, p. 473.

(*e*) Stephen's Commentaries, vol. ii., pp. 238, 239. This last jurisdiction was abolished by 26 Geo. 2, c. 33, and 4 Geo. 4, c. 76, s. 27.

(*f*) Stephen's Commentaries (ed. 7), vol. iii., pp. 305 *et seq.*

(*g*) *Vanbrough* v. *Cock*, 1 Chanc. Cases, 200.

purely spiritual (*h*). But they had a right to control the spiritual court in cases in which it proceeded in opposition to the common law, on points in which the common law predominated over the law ecclesiastical (*i*).

The temporal courts had also a right to restrain the spiritual court from contradicting what had been already finally decided upon by temporal judges, under authority expressly given to them by Act of Parliament (*k*).

But the Court of Chancery refused to interfere in cases where the ecclesiastical courts had an exclusive jurisdiction (*l*). Thus, it refused to try questions concerning wills of personalty, either before or after probate, but referred the parties to the ecclesiastical court (*m*). It would, however, interfere under certain circumstances (*n*).

Again, the probate if pleaded (*o*), was conclusive evidence of a will of personalty (*p*), except in the case of the probate itself having been forged, or having been obtained by surprise (*q*) ; in which case the probate might be annulled by sentence of the ecclesiastical court (*r*).

Thus even fraud in obtaining probate of a will of personalty, was not examinable in chancery, after the will had been proved in the ecclesiastical court, so long as the probate remained in force (*s*).

Nor was it examinable in the courts of common law. Thus payment of money to an executor, who had obtained probate of a forged

(*h*) *Bird* v. *Smith*, Moore, 781 ; *Cawdrey's Case*, Co. Rep., vol. iii., p. 15 ; *Phillips* v. *Crawly*, 1 Freeman, 83 ; *R.* v. *New College*, 2 Levinz, 14.

(*i*) *Hinks* v. *Harris*, Carthew, 271 ; Hargrave's Tracts, p. 478.

(*k*) *Webb* v. *Cook*, Cro. Jac. 535, 625, and Appendix B., p. 417 ; *Boyle* v. *Boyle*, 3 Mod., 164, Appendix B., p. 417.

(*l*) *R.* v. *Blatch*, 5 Ves. junr., 113.

(*m*) *Attorney-General* v. *Ryder*, 2 Ch. Cas. 178 ; *Archer* v. *Moss*, 2 Vern., 8 ; *Nelson* v. *Oldfield*, 2 Vern., 76 ; *Plume* v. *Beale*, 1 P. Wms., 388 ; *Stapleton* v. *Gardiner*, 2 P. Wms., 286 ; *Brassby* v. *Kerridge*, 1 P. Wms., 548 ; *Andrews* v. *Powers*, Vin. Ab., vol. viii., p. 548, vol. xi., pp. 59, 66 ; *Bennet* v. *Wade*, 2 Atk., 324 ; Hargrave's Tracts, pp. 462, 463.

(*n*) *Sheffield* v. *Duchess of Buckingham*, 1 Atk., 630.

(*o*) *Phillips* v. *Chichester*, Sir T. Raymond, 404, and Hargrave's Tracts, p. 460 ; see also a case cited by Coke in *Heaslo's Case*, Co. Rep., vol. v., p. 64, where a history is given of the jurisdiction of the ecclesiastical courts in probate and administration.

(*p*) *Noel* v. *Wells*, 1 Levinz, 235, Appendix B., p. 414.

(*q*) *Phillips* v. *Chichester*, Sir T. Raymond, 404, and Hargrave's Tracts, p. 460.

(*r*) *Anon. Cas.*, Comyns' Rep., 150.

(*s*) *Archer* v. *Moss*, 2 Vern., 8 ; *Allen* v. *McPherson*, 1 H. L. Cas., 191. This was not so, however, in a case of a will of realty ; see *Barnesly* v. *Powel*, 1 Ves., 287.

will, was held to be a discharge to the party paying it, and a bar to its being recovered again by another party to whom letters of administration were afterwards granted when the probate was repealed (*t*).

Fraud, however, in obtaining probate of a will did not estop criminal proceedings for forging the will of which probate had been obtained (*u*).

Again, as the spiritual court had an exclusive jurisdiction in administration, the Court of Chancery, in exercising its concurrent jurisdiction as to distribution, was concluded by sentences of the spiritual court in administration (*v*), so long as they remained unrevoked (*x*).

In cases where the Court of Chancery had a jurisdiction concurrent with that of the spiritual court, if proceedings were first taken in the spiritual court, the Court of Chancery would not, as a rule, stay them by injunction (*y*); except in the case of legacies to infants (*z*). But a bill might be brought in chancery against an executor for discovery of the personal estate, before the will was proved, or during the litigation thereof, in the ecclesiastical court (*a*). And remedies might be pursued against an executor, concurrently in the ecclesiastical court and in the Court of Chancery (*b*).

Questions of Marriage.—The temporal courts could try the *fact* of marriage. But the lawfulness of marriage could only be determined by the ecclesiastical court, unless it came in question in the temporal courts incidentally with other issues (*c*). And even a fraudulent sentence of the spiritual court, in a suit for jactitation of marriage, was conclusive in subsequent (civil) proceedings in the temporal

(*t*) *Allen* v. *Dundas*, 3 T. R. 125; *Allen* v. *McPherson*, 1 H. L. Cas. 191.

(*u*) *R.* v. *Buttery and Macnamara*, R. & R., C. C. R., 324, and other cases in Appendix B., p. 416, note (*c*).

(*v*) *Bonchier* v. *Taylor*, 4 Brown's Cases in Parliament, 708: *Thomas* v. *Ketteriche*, 1 Ves., senr., 333, and Hargrave's Tracts, pp. 472—476; see, however, *Parker* v. *Dee*, Finch, 123, where an administration was repealed in Chancery, in proceedings on a bill for discovery of the intestate's estate, and new letters of administration granted to another, to whom the first administrator had accounted in the Prerogative Court.

(*x*) Buller's N. P., 247.

(*y*) *Nicholas* v. *Nicholas*, Prec. in Ch., 546; *Basset* v. *Basset*, 3 Atk., 207; *Reynish* v. *Martin*, 3 Atk., 333.

(*z*) *Rotherham* v. *Fanshaw*, 3 Atk., 627.

(*a*) *Dulwich College* v. *Johnson*, 2 Vern., 48.

(*b*) *Digby* v. *Cornwallis*, 3 Rep. in Ch., 40.

(*c*) *Emerton* v. *Hide*, Comb., 72; *Pride* v. *Earl of Bath*, 3 Levinz, 410; *Hilliard* v. *Phaley*, 8 Mod., 180, and Hargrave's Tracts, p. 478; *Bonchier* v. *Taylor*, 4 Brown's Cases in Parliament, 708.

courts. Thus in *Meadows* v. *Duchess of Kingston* (*d*), which was a bill in chancery to set aside the will of the Duke of Kingston, bequeathing certain property to the Duchess, on the ground that it was founded in fraud, the Duchess having imposed herself upon the Duke as a single woman, and in which the defendant pleaded the same sentence of the ecclesiastical court as was submitted in evidence in the *Duchess of Kingston's case*, the sentence was held to be conclusive. Lord Chancellor Apsley said, "I lay it down as a general rule, that wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment, of any other court having competent jurisdiction, shall be received as conclusive evidence of the matter so determined (*e*). The general rule, however, respecting sentences of the spiritual court in dissolution of or against marriage, appears to have been, 'Sententia contra matrimonium nunquam transit in rem judicatam' (*f*). Hence, though such sentences were usually conclusive as evidence in the temporal courts (*g*), they were not pleaded as estoppels, and did not operate, strictly speaking, as such. They were, however, similar to estoppels in their binding effect upon parties and privies (*h*). And they might even bind strangers (*i*). Such sentences, however, though binding on the temporal courts, were not so in the spiritual court itself, but were liable to be reversed there (*j*). The effect by way of estoppel of judgments of the Divorce Court (now the Probate, Divorce, &c., Division of the High Court of Justice) has already been discussed in a previous chapter (*k*).

(*d*) 2 Ambler, 756. But the same sentence was held to be not conclusive in subsequent criminal proceedings. See the *Duchess of Kingston's case*, Appendix B.

(*e*) For a further discussion of the effect of fraud upon ecclesiastical sentences, see chap. iii., *ante*, pp. 70—74.

(*f*) There does not appear, however, to be any such rule now in existence. See *Lockyer* v. *Ferryman*, L. R. 2 App. Cas. at p. 521 (note 7).

(*g*) *Kenn's case*, Co. Rep. vol. iv., p. 136, and Appendix B., *post*, p. 412; *Meadows* v. *Duchess of Kingston*, 2 Ambler, 756.

(*h*) *Jones* v. *Bare*, Carth. 225, and Appendix B., p. 411; *Clers* v. *Bathurst*, 2 Str. 960, and Appendix B., p. 413; *Da Costa* v. *Villa Real*, 2 Str. 960, and Appendix B., p. 414; *Mendez* v. *Villa Real*, Cases temp. Hard. 18.

(*i*) *Bunting* v. *Lepingwell*, Co. Rep., vol. ii., 355, and Appendix B., p. 412; *Hatfield* v. *Hatfield*, 5 Brown's Cases in Parliament, 100, and Appendix B., p. 413. See, however, the opinions of the judges in the *Duchess of Kingston's case*, Appendix B., p. 424, giving a history of the jurisdiction of the ecclesiastical courts.

(*j*) *Kenn's case*, Co. Rep., vol. iv., p. 136, and Appendix B., p. 412.

(*k*) See chap. iv., *ante*, pp. 83—85.

APPENDIX B.

THE DUCHESS OF KINGSTON'S CASE.

This was the trial of the Duchess of Kingston for bigamy (*a*). The trial took place before the House of Peers in Westminster Hall, in the year 1776. The facts of the case, as stated in the report of the trial in Leach's Crown Cases, were as follows :—Elizabeth Chudleigh married the Honourable Augustus John Hervey in 1744. In 1768 she instituted a suit for jactitation (*b*) of marriage against Mr. Hervey in the Consistory Court of the Bishop of London. The defendant admitted the jactitation. In February, 1769, sentence in the jactitation suit was pronounced to the following effect, namely, "That the said E. Chudleigh was, and now is a spinster, and free from all matrimonial contracts and espousals with the said A. J. Hervey" (*c*). In March, 1769, Miss Chudleigh married the

(*a*) 20 St. Trials, pp. 355—651 ; 1 Leach C. C. 146 ; Smith's L. C. (8th ed.), vol. ii., pp. 784 *et seq.* The case, as laid before Hargrave, who was consulted as junior counsel by the prosecution, was as follows :—A., claiming to be a single woman, libels B., in the Consistorial Court of the Bishop of London, for jactitation of marriage. B. defends himself by alleging a marriage, and to this allegation A. puts in an answer. Afterwards witnesses are examined, and the cause is heard before the bishop's official, who pronounces sentence by which he declares A a spinster, and free from all matrimonial contracts or esponsals, as far to us as yet appears, and concludes with an award of costs against B., in words describing the sentence to be a definitive sentence or final decree. Relying on this sentence, A. marries C., after whose death A. is indicted, under 1 Jac. 1, c. xi., for felony in marrying C., her former husband B being then alive. Upon the above facts, Hargrave was of opinion that the sentence of the Ecclesiastical Court, if obtained *bonâ fide*, was binding on the Crown in the prosecution for bigamy, but that it might be avoided on the ground of fraud. (See his opinion in Hargrave's Tracts, pp. 450—486.)

(*b*) As to the nature of a suit for jactitation, see the opinions of the judges, *post* p. 427.

(*c*) See also *post* p. 429, where the above sentence is set out verbatim.

Duke of Kingston. On January 9th, 1776, an indictment was found against her for bigamy (*d*). The counsel for the prosecution were the Attorney-General, the Solicitor-General (afterwards Lord Chancellor Wedderburn), Mr. Dunning, and Dr. Harris. The counsel for the prisoner were Mr. Wallace, Mr. Mansfield (afterwards Lord Chief Justice), Dr. Calvert, and Dr. Wynne. It was submitted by the prisoner's counsel, that the above sentence of the consistory court was conclusive, and that no other evidence ought to be received or stated against the prisoner, respecting the said marriage. The prisoner was however found guilty, subject to the opinions of the judges, Sir W. De Grey (L. C. J. of Common Pleas, afterwards Lord Walsingham), Sir Sydney Stafford Smythe (L. C. B. of the Exchequer), and other judges, upon the following questions, which were propounded to them, viz. :—1. Whether a sentence of the spiritual court against a marriage, in a suit for jactitation of marriage, is conclusive evidence, so as to stop the counsel for the Crown from proving the said marriage, in an indictment for polygamy? 2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud and collusion? In answer to the above questions, the judges were unanimously of opinion: First:—That a sentence of the spiritual court against a marriage, in a suit for jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the Crown from proving the said marriage, in an indictment for polygamy. Secondly:—That, admitting the sentence to be conclusive upon such indictment, the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud and collusion.

The case is reported at length in vol. 20 of the State Trials, from which the following extracts are taken:—

Wallace, for the prisoner, cited (1.) *Jones* v. *Bore* (*e*). This was an action of ejectment, brought by the issue of a marriage between

(*d*) The indictment was framed under the Stat. 1 Jac. 1, c. xi., which contained a proviso that the Act should not extend (*a*) to any persons that should be, at the date of the second marriage, divorced from the first marriage by sentence of the ecclesiastical court, (*b*) to any persons where the first marriage had, by sentence in the ecclesiastical court, been declared to be void and of no effect, and (*c*) to any persons who, at the date of the first marriage, were under the age of consent.

(*e*) Carth. 225.

Sir Robert Carr and Isabella Jones. The question was whether Sir Robert Carr was actually married to Miss Jones. The defendant put in evidence a sentence of the Court of Arches, upon a suit for jactitation of marriage brought against Miss Jones by Sir Robert Carr, by which it was decreed that there was no marriage between them. Subsequently to the decree both parties had married again. The court was of opinion that the sentence was conclusive, and that the temporal courts were bound by it, it being a matter of mere spiritual cognizance. (2.) *Bunting* v. *Lepingwell* (*f*). In this case B. contracted with A. to marry her, and afterwards A. married T. and cohabited with him. B. sued A. in the Court of Audience, and proved the contract. Sentence was pronounced that A. should marry B. and cohabit with him, which she did, and they had issue C. Held :—That this sentence bound T., who was *de facto* A.'s husband at the time it was pronounced, though he was no party to the suit (*g*). (3.) *Kenn's case* (*h*). In this case A. married B., and had issue C. A divorce was decreed in the Court of Audience in a suit in which A. was plaintiff, and B. defendant, upon the ground that the parties were under the age of consent at the date of the marriage contract (*i.e.*, the man under fourteen, and the woman under twelve). A. then married D. D. died, and A. married E., and had issue F. A. died. G. and his wife were appointed guardians of F. C., (who meanwhile had married, and had had issue K., who had married L. and died), then exhibited a bill in the Court of Wards against G. and E., alleging that A. and B. were of full age at the date of the marriage contract, that their marriage was lawful, and that they had cohabited for 8 or 9 years before the supposed divorce and that C. was their lawful issue. Held :—That the sentence of divorce, so long as it remained in force, was binding, and that K. and L. were concluded by it (*i*). (4.) *Blackham's case* (*k*). This was an action of trover, to recover damages for the unlawful detention of certain

(*f*) Co. Rep., vol. ii., 355.

(*g*) See also *Corbet's case*, Co. Rep., vol. iv. at p. 140, as to the effect of spiritual sentences upon matters *incidentally* coming in question. As to sentences of the spiritual courts in cases of marriage contract, see also *Jesson* v. *Collins*, 2 Salk. 439.

(*h*) Co. Rep., vol. iv., p. 136.

(*i*) In this case there was no doubt, had the matter been gone into, that the marriage was effectual, for, even if the parties had been under age, the subsequent cohabitation would have cured this defect. (See Wallace's remarks on the case.)

(*k*) 1 Salk. 290.

goods which were in plaintiff's possession. Plaintiff proved the possession of the goods, and that defendant took them away. Defendant showed that they were Jane Blackham's goods in her lifetime, and that he took out letters of administration to her. The plaintiff, on the other hand, proved that before her death she was married to *him*. In answer to this, the defendant relied on the grant of letters of administration to him, as conclusive that there was no marriage between Jane Blackham and the plaintiff. Held:—By Holt, C. J., that the sentence of the spiritual court was not conclusive, as it was on a collateral matter. (5.) *Hatfield* v. *Hatfield* (*l*). The facts of this case were as follows:—L. Hatfield married Jane Porter, and by will made provision for her out of a property in Ireland. Jane subsequently filed a bill in the Court of Exchequer in Ireland, against L. Hatfield (a son by a former wife) and a trustee, to recover the provision. Defendants, having discovered that she had, previously to her marriage with Hatfield, married Porter, who was then living, procured a release of part of the provision from Porter, and filed a cross bill in the same court for a discovery of the marriage, and to stay proceedings on the original bill. Pending the cause, Jane Porter, acting in collusion (*m*) with Porter, instituted a suit in the ecclesiastical court for jactitation of her marriage with Porter, and obtained sentence in her favour by default. The Court of Exchequer held that they were bound by the sentence, and their ruling was upheld in the House of Lords (*n*). (6.) *Cleus* v. *Bathurst* (*o*). This was an action for maliciously procuring the plaintiff's wife to exhibit articles of the peace against him, and for living in adultery with her. Plaintiff proved the marriage and the consummation. Defendant produced in evidence a sentence of the Consistory Court of London in a cause of jactitation of marriage, brought by plaintiff's wife against the plaintiff, pronouncing the woman free. The sentence was not pronounced till after issue had been

(*l*) 5 Brown's Cases in Parliament, 100; cited in *Da Costa* v. *Villa Real*, 2 Str. 960.

(*m*) But *quære* whether the sentence was collusive. See the remarks of the Attorney-General on the case, at p. 462 of 20 St. Trials. See, however, the head-note to the case.

(*n*) Viner's remark on this case, in the Abridgment, vol. xv., p. 262, is, That the legality of a marriage shall never be agitated in equity, especially after sentence in the spiritual court in a cause of jactitation of marriage, although the proceedings in the spiritual court were only feint and collusive.

(*o*) 2 Str. 960; and Cases temp. Hardw. 11.

joined in the action. Nevertheless, Lord Hardwicke ruled that the sentence was conclusive, and plaintiff was non-suited (*p*). (7.) *Da Costa* v. *Villa Real* (*q*). This was an action upon a contract of marriage. Defendant put in evidence a sentence of the spiritual court in a cause of contract (*i.e.*, for specific performance of the contract of marriage), declaring Mrs. Villa Real free from all contract. This was held conclusive, as it was a cause within the jurisdiction of the spiritual court. (8.) An action was brought by a tradesman against the Honourable T. Hervey, for necessaries supplied to his wife. The marriage was proved, and verdict was given for the plaintiff. Hervey then instituted, in the Consistory Court of London, a suit for jactitation of marriage, and obtained sentence in his favour. Pending an appeal from the sentence, another creditor brought an action against Hervey under circumstances similar to those in the former action. Hervey, however, relied on the sentence in the Consistory Court, and it was held to be conclusive (*r*). (9.) *Noel* v. *Wells* (*s*). This was an action of debt, brought by plaintiff as executrix of her husband's will. Plaintiff produced probate of the will. Defendant contended that the will was forged. Held :—That no evidence could be given directly against the seal of the ordinary, in a matter within his jurisdiction, though it was open to proof that the seal of the ordinary was itself forged, or had been repealed. (10.) *Bransby* v. *Kerridge* (*t*). In this case R. Bransby, the complainant's son, being entitled to a reversion in certain freeholds and copyholds expectant on the death of the complainant, made a will devising all his real and personal estate to the defendant, and made him his executor. The will was proved by the defendant in the ecclesiastical court. Subsequently there was a suit in the ecclesiastical court, in which sentence was pronounced in favour of the will. Bransby the father then filed a bill in chancery, to set

(*p*) In the report of the above case in Cases temp. Hardw., the law is stated as follows, "Where it was incidentally judged that the parties were not married, and upon that administration was denied, the court declared their opinion that it could not be given in evidence in the courts of common law; but where sentence is given in a principal cause, it is otherwise."

(*q*) 2 Str. 960; see also *Mendez* v. *Villa Real*, Cases temp. Hardw. 18; *Jesson* v. *Collins*, 2 Salk. 437.

(*r*) The sentence in the Consistory Court was afterwards reversed on appeal.

(*s*) 1 Levinz, 235, cited approvingly in *R.* v. *Raines*, 1 Ld. Raymd. 262.

(*t*) 1 P. Wms. 548.

aside the will for fraud and imposition, and, upon proof of several acts of fraud, the Lord Chancellor made a decree that defendant should be trustee for the next of kin. But the House of Lords reversed this decree, upon the ground that it was not competent to a court of equity to examine into fraud and imposition in a will touching personal estate, as the court of ecclesiastical jurisdiction had already decided the point. (11.) *Hughes* v. *Cornelius* (*u*). The facts in this case were as follows:—In the war between the Dutch and the French in Charles II.'s reign, a ship was seized by the French as a Dutch ship, and condemned for prize in the admiralty court in France, and was sold under order of the court. The ship was in fact an English ship at the time of the seizure. Plaintiff bought the ship and brought her to England, where the right owner seized her. In an action of trover by plaintiff against the right owner, it was held that defendant was precluded, by the sentence in the French court, from proving the ship to be his property. (12.) *Burrows* v. *Jemino* (*x*). The facts of this case were as follows:—A bill of exchange was drawn upon the plaintiff at Leghorn, and accepted by him. By the law there, if a bill be accepted, and the drawer fails, and the acceptor had not, at the time of acceptance, sufficient effects of the drawer to meet the bill, the acceptance becomes void. This being the case, plaintiff, in order to discharge himself from his acceptance, instituted a suit at Leghorn, and his acceptance was vacated by a sentence in that court. He afterwards returned to England, and was sued at law upon his bill, and he thereupon exhibited a bill in the Court of Chancery for his relief. Lord Chancellor King decided that plaintiff's bill having been vacated and declared void by a court of competent jurisdiction, the sentence was conclusive and bound the Court of Chancery: and a perpetual injunction was granted, to enjoin defendant from suing on his bill. (13.) *Philips* v. *Bury* (*y*). In this case Justices S. Eyres, C. Eyres, and Gregory were of opinion that a sentence of deprivation by the bishop as visitor of Exeter College, Oxford, of the rector of the college, was examinable in a court of error. Holt, C. J., was of a contrary opinion, and his judgment was upheld in the House of Lords (*z*).

(*u*) 2 Shower, 232; see also *R.* v. *Raines*, 1 Ld. Raymd. 262; *Oddy* v. *Bovill*, 2 East, 476.

(*x*) 2 Str. 733.

(*y*) 2 T. R. 346.

(*z*) Justice S. Eyres delivered an elaborate judgment, to the effect that sentences of the ecclesiastical court,

(14.) *Biddulph* v. *Ather* (*a*), in which it was agreed by the judges, that a sentence in the ecclesiastical court, in a matter whereof it has the sole cognizance, is conclusive evidence, and that parol evidence should not be received against it. (15.) *R.* v. *Vincent* (*b*). This was a prosecution, on indictment, for forging a will of personal estate. On the trial at the Old Bailey, a forgery was proved, but probate of the will was produced in evidence on behalf of the prisoner, and this was held conclusive in support of the will (*c*). (16.) *R.* v. *Grandon* (*d*). In this case defendant was indicted for an assault, in turning the prosecutor, who was a fellow-commoner of Queen's College, Cambridge, out of the college. Defendant produced in evidence an order of expulsion of the prosecutor made by the college, and also gave evidence to show that he was acting as the officer of the college in enforcing the order. Prosecutor, in answer, offered to prove the invalidity of the order, by reference to the constitution of the college, but the judge at *nisi prius* rejected the evidence, and ruled that the order of expulsion was conclusive; and his ruling was upheld in the court of King's Bench.

Mansfield (on the same side) cited (17.) *Morris* v. *Webber* (*e*). In this case, which was an action in the temporal courts, A. and B. had been married for several years, and had no offspring. Proceedings were then taken in the ecclesiastical court, and sentence of divorce pronounced, "propter vitium perpetuum et impotentiam generationis," in A. the husband. Subsequently A. and B. had both married again, and had both had children by their second marriages. One of the issues in the case was, whether A.'s issue by the second marriage was legitimate or not. The sentence of divorce, though founded in falsehood, was held to be binding and conclusive, and the issue of the second marriage was held to be legitimate.

even upon matters over which they had exclusive jurisdiction, were not binding on the temporal courts, if such matters subsequently came incidentally in question, *upon the trial of a title to land*.

(*a*) 2 Wils. 23.

(*b*) 1 Str. 481.

(*c*) This case has, however, though cited with approval by L. C. Apsley in *Meadows* v. *Duchess of Kingston*, 2 Ambl. at p. 763, been overruled on several occasions; see especially *R.* v. *Buttery & Macnamara*, R. & R. C. C. R. 342, and *R.* v. *Gibson*, there cited; *R.* v. *Goodrich*, cited in *Allen* v. *Dundas*, 3 T. R. at p. 126. And, as to the conclusive effect of the probate of a will or grant of letters of administration, see 2 Ambl. 762 (note).

(*d*) 1 Cowp. 315, referred to as *R.* v. *Gardell* in *Collett* v. *Lord Keith*, 2 East, 268.

(*e*) Moore, 225.

Dr. Calvert (on the same side) cited (18.) *Corbet's case* (*f*), in which it was decided *inter alia*, that the spiritual court only had jurisdiction, when the whole cause was spiritual; that when the whole cause was originally spiritual, yet if afterwards the spiritual court attempted to try temporal issues, a prohibition should issue; and that a divorce, pronounced after the death of any of the parties, or a sentence declaratory that the marriage was void, pronounced after the death of any of the parties, was not binding. (19.) *Millisent* v. *Millisent* (*g*). In this case a woman pretended to be Millisent's wife, whereupon he sued her for jactitation of marriage, and it was adjudged to be no marriage. The woman afterwards in the Court of Delegates pretended to be Millisent's widow, and offered to prove her marriage, but the common law judges were of opinion, that she could not be admitted to prove it, since there remained in force a sentence in bar against her. (20.) *R.* v. *Rhodes* (*h*). In this case defendant had exhibited a will in Doctor's Commons as executor, and demanded probate: the will was contested and upheld. Pending an appeal from the decision, defendant was indicted for forging the will. But the chief justice said, that, there being a sentence subsisting in favour of the will, and the validity of that sentence being under review, he did not think it fitting to determine the matter by an indictment, which would come on more properly after the sentence was reversed (*i*).

Dr. Wynne (on the same side) cited (21.) *Boyle* v. *Boyle* (*k*). It was decided in this case that if a man took proceedings against a woman in the spiritual court *pro jactitatione maritagii*, after he had been convicted of bigamy in marrying the woman against whom he took such proceedings, a prohibition should be granted. For that a conviction in a court of criminal jurisdiction was conclusive evidence of the fact.

One of the counsel for the defence also cited (22.) *Webb* v. *Cook* (*l*). In this case, a suit for defamation was begun in the ecclesiastical

(*f*) Cited in *Kent's case*, Co. Rep., vol. iv., at p. 140.

(*g*) Cited by Dr. Lee in *Chase* v. *Bathurst*, Cases temp. Hardwicke, p. 11.

(*h*) 2 Strange's Rep. 703 (12 G. I.).

(*i*) See, however, *R.* v. *Battery & Macnamara*, R. & R. C. C. R. 342, and *R.* v. *Gibson*, there cited. The sentence in question was afterwards confirmed on appeal.

(*k*) 3 Mod. 161.

(*l*) Cro. Jac. 535, 625; see also *Thurston* v. *Pickering*, 3 Keble, 200; *Seele* v. *Williams*, Hobart, 288; *Higgon* v. *Coppinger*, Sir W. Jones, 320.

court at Norwich for saying that plaintiff had a bastard child. Defendant, in justification, put in evidence an order of two justices of the peace adjudging the plaintiff to be the reputed father of the bastard, and this evidence being refused, a prohibition was granted (*m*). (23.) *Fursman* v. *Fursman*. This was a suit by the wife, in the Consistory Court of Exeter, for restitution of conjugal rights. A prohibition was afterwards obtained to stay further proceedings, on the ground that plaintiff had indicted defendant for bigamy in marrying another wife in her lifetime, and had failed in proof of her own marriage; whereupon defendant had been acquitted of bigamy.

The Attorney-General (for the prosecution) cited (1.) *Robins* v. *Crutchley* (*n*). In this case Sir W. Wolseley had exhibited a bill in the spiritual court against Robins as being his wife, charging her with adultery with John Robins, and praying a divorce. She pleaded that she was the lawful wife of John Robins, and not of Wolseley. The issue was decided in the Court of Arches in favour of Robins. John Robins then died, and his widow brought an action of dower against defendant, who pleaded *ne unques accouple*. It was decided that the above sentence of the spiritual court could not be pleaded by the defendant by way of estoppel, though it might be evidence to go to the jury. For that, though the certificate of the bishop might be pleaded by way of estoppel, a sentence in the spiritual court was not a record, nor was it final even in that court: and therefore that the court would not be bound by a sentence by which the spiritual court itself was not bound. (2.) *Roach* v. *Garvan* (*o*), where Lord Hardwicke stated that in cases where a marriage had in fact taken place, or in the case of a contract in *praesenti*, or in a suit for restitution of conjugal rights, a sentence in the ecclesiastical court (unless there was collusion, which would overturn the whole) would be conclusive and bind all: but not if given in a collateral suit, as for a criminal action: for it would only bind the rights of the marriage in the three cases above (*p*).

(*m*) See also *R.* v. *Rislip*, 1 Lord Raymond, 394; *Thornton* v. *Pickering*, 3 Keble, 200; *Serle* v. *Williams*, Hobart, at p. 294. And, as to prohibitions in ecclesiastical courts, see also *Higgon* v. *Coppinger*, Sir W. Jones, 320.

(*n*) 2 Wils. 118.

(*o*) 1 Ves. senr. 157.

(*p*) See also *Brownsword* v. *Edwards*, 2 Ves. senr. 245.

(3.) *Lloid* v. *Maddox* (*q*). In this case an executor, being sued in the court christian for a legacy, pleaded a recovery in debt which had exhausted the assets. Plaintiff (the legatee) replied that the recovery was covinous. The allegation was admitted, and the King's Bench refused to grant a prohibition.

The Solicitor-General (on the same side) cited (4.) *Prudham* v. *Phillips* (*r*). This was an an action of assumpsit. Defendant gave in evidence her marriage with M. Plaintiff produced a sentence of the ecclesiastical court annulling it. Defendant, in answer to this, sought to avoid the sentence on the ground of fraud. Willes, C. J., distinguished between the case of a *stranger*, who cannot come in and reverse the judgment, and therefore should be allowed to raise fraud, and a *party*. The proper course for a party to take, is to apply to the court to *vacate* the sentence, and therefore defendant (being a party) was not allowed to avoid the sentence on the ground of fraud. (5.) *Sinclair* v. *Fraser* (*s*). In this case judgment had been obtained against defendant in Jamaica. Plaintiff sued upon the judgment in Scotland. The Court of Session refused to give effect to it, and held that plaintiff was bound to prove the ground, the nature, and the extent of his demand. The judgment of the Court of Session was, however, reversed in the House of Lords, where it was held that the judgment of the court of Jamaica should be received as *primâ facie* evidence of the debt, and that the onus rested on defendant of showing that it had been irregularly and unduly obtained. (6.) *R.* v. *Sterling*, and *R.* v. *Richardson* (*t*). (7.) A case in which a man committed an act of bankruptcy by collusion with a creditor. A commission of bankruptcy was then taken out against him. He concealed part of his effects, and was prosecuted for it. Though not a bankrupt to any civil effect (on account of the fraud), he was not allowed to take that point by way of defence to the prosecution, but was convicted.

Dr. Harris (on the same side) cited (8.) *Farr's case* (*u*). In this case Richard Farr and Eleanor Chadwicke were indicted at the Old

(*q*) Moore, 917.

(*r*) 2 Ambler's Rep. 762.

(*s*) Cited in *Walker* v. *Witter*, 1 Dougl. 4; see also the note and the cases therein referred to in 20 St. Trials, p. 468.

(*t*) Old Bailey Sessions Papers, 1761—1765, p. 348. See also 1 Leach C. C. 99, and East's P. C., vol. ii., 949. These were both cases of forgery of wills of persons who were living at the time of the forgery.

(*u*) 1 Sid. 254.

Bailey for breaking and entering the house of Robert Stanger, and stealing his goods. The facts were as follows: Mrs. Stanger lived in the house apart from her husband. Farr went to an attorney and told him that Mrs. Stanger was his tenant and was in arrear for rent. He then brought an action of ejectment against her. By means of false affidavits, judgment in the action of ejectment was obtained, and there was a writ to the sheriff to deliver possession. Mrs. Stanger was then turned out of the house, and arrested by Farr for debt. Meanwhile Farr and Chadwicke proceeded to rifle the house of its contents. Held: That the judgment in the action of ejectment could not be set up by the prisoners as a bar to the prosecution.

Wallace (in reply) cited, (1.) *Twyne's case* (*x*), (2.) *Lady Mayo's case* (*y*).

The opinion of the judges.—The following is the opinion of the judges *in extenso*, in answer to the questions (*z*) submitted to them. The Lord Chief Justice of the Common Pleas (Sir William De Grey, afterwards Lord Walsingham), having conferred with the rest of the judges present, delivered their unanimous opinion upon the said questions, with their reasons, as follows, viz. :—

"My lords, my lord chief baron (Sir Sidney Stafford Smythe), and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

"That our opinion may be the better understood it is necessary to make some observations on what has passed in argument upon the subject.

"What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial pro-

(*x*) Smith's L. C. (8th ed.), vol. i., p. 1. This case was cited in support of an argument that, by the common law, persons who were permitted to rescind a transaction upon the ground of fraud, must have an interest vested at the time. It was agreed in the case of *Upton and Bassel*, Smith's L. C. (8th ed.), vol. i., p. 9, that, by the common law, an estate made by fraud should be avoided only by him who had a former right, title, interest, debt, or demand; as, by 33 H. 6, a sale in market overt by covin, does not bar a right or title which is more ancient, but only a right or title which is more puisne (*i.e.*, more recent).

(*y*) See *ante*, p. 72. This case was also cited by Dr. Calvert (at p. 425), by Dr. Wynne (at p. 431), and by Dr. Harris (at p. 501). But see the remarks of the Attorney-General thereon (at p. 462).

(*z*) The questions, and the substance of the answers thereto, are given, *ante*, p. 411.

ceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous: and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule founded upon particular reasons; but, not being applicable to the present subject, it is unnecessary to state them.

"From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court (*a*); secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally (*b*) in question in another court, for a different purpose (*c*). But neither the judgment of a concurrent or exclusive jurisdiction, is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally (*d*) cognizable, nor of any matter to be inferred (*e*) by argu-

(*a*) See also *Burrows* v. *Jemino*, 2 Str. 733, *ante*, p. 415; *Meadows* v. *Duchess of Kingston*, 2 Ambl. 756, *ante*, p. 409; *Webb* v. *Cook*, Cro. Jac. 626, *ante*, p. 417: per Lord Denman, C. J., in *R.* v. *Wick St. Lawrence*, 5 B. & Ad. at p. 533.

(*b*) See also *Tarleton* v. *Tarleton*, 4 M. & S. 21.

(*c*) See also *Blackham's case*, 1 Salk. 290, *ante*, p. 412; *Bouchier* v. *Taylor*, 4 Brown's Cases in Parliament, 708; *Barrs* v. *Jackson*, 1 Y. & C. C. C. 585.

(*d*) It is stated, however, by Story in his Conflict of Laws (7th ed.), at p. 740, that in England judgments *in rem* are held conclusive, not only *in rem*, but also as to all the points and facts which they professedly or incidentally decide; and he cites, in support of the statement, *Bluet* v. *Bampfield*, 1 Cases in Chanc. 237, cited as *Blad* v. *Bamfield* in 3 Swanst. 604. In that case, defendants (English subjects) having traded in Iceland, in contravention of certain privileges granted to plaintiff and others, plaintiff's estate in Iceland had been seized and condemned in the Danish courts. Defendants then brought actions of trespass and trover (in England) for seizing the said property. But Lord Nottingham held the sentence of condemnation to be conclusive, and granted a perpetual injunction restraining the said actions.

(*e*) See also *Day* v. *Spread*, 1 Jebb

ment from the judgment (*f*). Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it: but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property: and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality, of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction: they do not want or require the aid of the spiritual courts: nor has the law provided any legal means of sending to them for their opinion: except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, 'general bastardy;' or, in like manner, in some other particular instances, lying peculiarly in the knowledge of their courts, as profession, deprivation, and some others; in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received, and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point: which exceptionable extent, on whatever reasons founded, was the occasion of the Statute of the 9th of Henry VI., requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceeding. But, even in these cases, if the ordinary should return no certificate, or an insufficient one, or, if the issue is accompanied with any special circumstances, as if a second issue, triable by a jury, is formed upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpose Sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals

& Bourke, 163; and for the application of this to an arbitrator's award, see *Newall* v. *Elliot*, 1 H. & C. 797.

(*f*) *Blackham's case*, 1 Salk. 290, *ante*, p. 412; *Robins* v. *Crutchley*, 2 Wils. 118, *ante*, p. 418; *Roach* v. *Garvan*, 1 Ves. senr. 157, *ante*, p. 418; *Brocksword* v. *Edwards*, 2 Ves. senr. 245. See *contra*, *Fursman* v. *Fursman*, *ante*, p. 418. It appears that the admissibility of the sentences of prize courts upon matters of fact is not restricted within the above limits. See judgment of Erle, C. J., in *Hobbs* v. *Henning*, 17 C. B. N. S. at p. 827.

were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

"So that the trial of marriage, either as to legality or fact, was not absolutely, and from its nature, an object *alieni fori*. There was a time, when the spiritual courts wished that their determinations might in all cases be received as authentic in the temporal courts; and in that solemn assembly of the king, the peers, the bishops, and judges, convened, for the purpose of settling the demands of the church, by Edward the Second, one of the claims was expressed in these words, "Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico judice fuerit sententialiter terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum: et postmodum, coram judice seculari, super eâdem re inter easdem personas questio moveatur, et provetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner:

"Quando eadem causa, diversis rationibus coram judicibus ecclesiasticis, et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico judicio) curia regis ipsum tractet negotium, ut sibi expedire videtur."

"For which Lord Coke gives this reason, second Institute, c. 22.

"'For the spiritual judges' proceedings are for the correction of the spiritual inner man, and "pro salute animæ," to enjoin his penance: and the judges of the common law proceed to give damages and recompense for the wrong and injury done;' and then adds, 'and so this article was deservedly rejected.'

"And the same demand was made, and received the same answer, in the third year of King James the First.

"It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the temporal courts from shewing the same respect to their proceedings, as they did to those in other courts. And therefore where, in civil causes, they found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts.

"Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate (*g*).

"A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage (*h*), and, in like manner, in personal actions immediately founded on a supposed marriage.

"So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent court, disproving the ground of the action (*i*).

"So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture (*j*).

"But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it: or claimed under those who were parties, and had acquiesced (*k*).

"But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration: first, because the parties are not the same: for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal: secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.

"The ground of the judicial powers given to ecclesiastical courts is, merely, of a spiritual consideration 'pro correctione morum, et pro salute animæ.' They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the

(*g*) *Bunting* v. *Lepingwell*, Co. Rep., vol. ii, p. 355; *Kenn's case*, Co. Rep., vol. iv., p. 136; *Morris* v. *Webber*, Moore, 225.

(*h*) *Jones* v. *Bore*, Carth. 225.

(*i*) *Da Costa* v. *Villa Real*, 2 Str. 960.

(*j*) See a case against Honble. T. Hervey, *ante*, p. 414.

(*k*) See, however, *Hatfield* v. *Hatfield*, *ante*, p. 413, and case against Honble. T. Hervey, *ante*, p. 414.

public peace: and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law, and judge of the crime, and its proofs: in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land: it is the trust and sworn duty of their office.

"When the acts of Henry VIII. first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and though the acts did not by express words give them any upon the point, decided incidentally upon the construction, declared what marriages came within the Levitical degrees, and prohibited the spiritual courts from giving or proceeding upon any other construction.

"Whilst an ancient statute subsisted (2 H. IV. 15), by which personal punishment was incurred on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; 'for the king's courts will examine all things ordained by statute.' When the statute of W. III. made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine, whether the doctrine complained of was blasphemous so as to constitute the crime.

"If a man should be indicted for taking a woman by force and marrying her; or for marrying a child without her father's consent; or for a rape, where the defence is, that 'the woman is his wife:' in all these cases, the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous: and whether it was a marriage within the statute, a marriage without consent: and whether, in the last case, the woman was his wife: but if they should happen to find that sentences, in the respective cases, had been given in the spiritual court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape, and the court must receive such sentences as conclusive evidence, in the first instance, without looking into the case, it would vest the substantial and effective decision, though not the cognizance of the crimes, in the spiritual court, and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a pre-

determined conviction or acquittal: which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding.

"And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual: and it is equally true, that the temporal courts have the sole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

"And if the rule of evidence must be, as it is often declared to be, reciprocal: and that in all cases in which sentences favourable to the prisoner are to be admitted as conclusive evidence for him, the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence against him, in what situation must the prisoners be, whose life, or liberty, or property or fame rests on the judgments of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the judges of the common law who must condemn on the word of an ecclesiastical judge, without exercising any judgment of their own? The spiritual court alone can deprive a clergyman. Felony is a good cause of deprivation, yet in Lord Hobart's Reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law: and although, after conviction, they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove anything against the verdict; because, as that very learned judge declares, it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime and the validity of the proofs: neither of which belongs to them to do."

"If therefore such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath) will direct or rule a jury and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact, and the difficulty will not be removed by

presuming that every court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the court: and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

"If the reason for receiving such sentence is, because it is the judgment of a court competent to the enquiry then before them: from the same reason, the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction. But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none), yet a cause of jactitation is of a different nature: it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage: and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz., that the party has failed in his proof, and that the libellant is free from all matrimonial contract, as far as yet appears: leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause; and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence, from going into new proofs to make out that or any other marriage. So that admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all: and, by the rule laid down by Lord Chief Justice Holt, such sentence can be no proof of anything to be inferred by argument from it: and therefore it is not to be inferred that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment may stand well together, and both propositions be equally true: it may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage. But if it was a direct and decisive sentence

upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within: yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken (*l*), it may be shown that they were misled. Fraud is an extrinsic collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal. In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries: and even a recovery by a just title, if collusion was practised to prevent a fair defence: and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

"In criminal proceedings if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands: and, even after a conviction by verdict, he may traverse the time.

"In the proceedings of the ecclesiastical court the same rule holds. In Dyer there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first: and, the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked: and, the fact being denied, issue was joined upon it: and, the collusion being found by a jury, the court gave judgment against it.

"In the more modern cases the question seems to have been whether the parties should be admitted to prove collusion: and not seeming to doubt but that strangers might (*m*).

"So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the courts of temporal jurisdiction. And, if fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts, which, from the nature of their proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed,

(*l*) *Morris* v. *Webber*, Moore, 225, and *ante*, p. 416.

(*m*) *Pridham* v. *Phillips*, 2 Ambl. 762, and *ante*, p. 419.

to be practised upon for sinister purposes, as the courts in Westminster Hall.

"We are, therefore, unanimously of opinion: First, that a sentence in the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy.

"But secondly, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion" (*n*).

The following was the sentence in the jactitation suit of *Chudleigh* v. *Hervey* (*o*):—

"Chudleigh against Hervey. Sentence read and promulged the 10th of February, 1769. In the name of God, amen. We John Bettesworth, doctor of laws, vicar-general of the right reverend father in God, Richard, by divine permission, lord bishop of London, and official principal of the consistorial and episcopal court of London, having seen, heard, and understood, and fully and maturely discussed the merits and circumstances of a certain cause of jactitation of marriage which was lately controverted, and as yet remains undetermined before us in judgment, between the honourable Elizabeth Chudleigh, of the parish of St. Margaret, Westminster, in the county of Middlesex, spinster, the party, agent, and complainant, of the one part, and the right honourable Augustus John Hervey, of the parish of St. James, Westminster, in the county of Middlesex and diocese of London, bachelor, falsely calling himself the husband of the said honourable Elizabeth Chudleigh, the party accused and complained of, on the other part: and we rightly and duly proceeding therein, and the parties aforesaid lawfully appearing before us by their proctors respectively, and the proctor of the said honourable Elizabeth Chudleigh praying sentence to be given and justice to be done to his party, and the proctor of the said right honourable Augustus John Hervey also earnestly praying sentence and justice to be done to his said party: and we having carefully looked into and duly considered of the whole proceedings had and done before us in the said cause, and observed by law what ought to be observed

(*n*) See Peake's Law of Evidence, c. 2, s. 2; 12 East, 411; East's Pleas of the Crown, c. 12, s. 5; and Hawkin's Pleas of the Crown, bk. I. c. 42, s. 11.

(*o*) See 20 St. Trials, pp. 389, 390.

in this behalf, have thought fit and do thus think fit to proceed to the giving and promulging our definitive sentence or final decree in this same cause, in manner and form following (to wit): Forasmuch as by the acts enacted, alleged, exhibited, propounded, proved, and confessed in this cause, we have found and clearly discovered, that the proctor of the said honourable Elizabeth Chudleigh hath fully and sufficiently founded and proved his intention deduced in a certain libel and allegation and other pleadings and exhibits given in, exhibited, and admitted on her behalf in this same cause, and now remaining in the registry of this court (which libel and allegation and other pleadings and exhibits, we take and will have taken as if herein repeated and inserted for us to pronounce as hereinafter we shall pronounce); and that nothing, at least effectual in law, hath on the part and behalf of the said right honourable Augustus John Hervey been excepted, deduced, exhibited, propounded, proved, or confessed in this same cause, which may or ought in anywise to defeat, prejudice, or weaken the intention of the said honourable Elizabeth Chudleigh deduced as aforesaid: and particularly that the said right honourable Augustus John Hervey hath totally failed in the proof of his allegation given in and admitted in this cause, whereby he pleaded and propounded a pretended marriage to have been solemnized between him and the said honourable Elizabeth Chudleigh, spinster; and therefore we John Bettesworth, doctor of laws, the judge aforesaid, first calling upon God and setting him alone before our eyes, and having heard counsel in this cause, do pronounce, decree, and declare, that the said honourable Elizabeth Chudleigh, at and during all the time mentioned in the said libel given in and admitted in this cause, and now remaining in the registry of this court, was and now is a spinster, and free from all matrimonial contracts or espousals (as far as to us as yet appears) more especially with the said right honourable Augustus John Hervey: and that the said right honourable Augustus John Hervey, notwithstanding the premises, did in the years and months libellate, wickedly and maliciously boast and publicly assert (though falsely) that he was contracted in marriage to the said honourable Elizabeth Chudleigh, or that they were joined or contracted together in matrimony: wherefore we do pronounce, decree, and declare, that perpetual silence must and ought to be imposed and enjoined upon the said right honourable Augustus John Hervey as to the premises libellate, which we do impose and enjoin him by these presents: and

we do decree the said right honourable Augustus John Hervey to be admonished to desist from his boasting and asserting that he was contracted to or joined with the said honourable Elizabeth Chudleigh in matrimony as aforesaid: and we do also pronounce, decree, and declare, that the said right honourable Augustus John Hervey ought by law to be condemned in lawful expenses made or to be made in this cause on the part and behalf of the said honourable Elizabeth Chudleigh, to be paid to the said Elizabeth Chudleigh or her proctor: and accordingly we do condemn him in such expenses, which we tax at and moderate to the sum of £100 of lawful money of Great Britain, besides the expense of a monition for payment on this behalf by this our definitive sentence or final decree, which we read and promulge by these presents.

"J. Bettesworth.

"Arth. Collier.
"Pet. Calvert.
"Wm. Wynne."

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